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No. 05-87

In The
Supreme Court of the United States

THE PEOPLE OF THE
STATE OF COLORADO,

Petitioner,

v.

ROBERT ELIOT HARLAN,

Respondent.

On Petition For A Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. As recently re-emphasized in *Ring v. Arizona*, the Sixth and Fourteenth Amendments require that Colorado juries, not judges, make the profoundly moral decision, required under the Eighth Amendment, as to whether death sentences should be imposed. Did the Colorado Supreme Court improperly undermine the jury's constitutional responsibilities under the Sixth and Eighth Amendments in ruling that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision without finding that jurors rested their moral decisions on biblical code rather than Colorado law?

2. The fact that a constitutional violation may have occurred in a death penalty sentencing proceeding, even one implicating a defendant's Sixth Amendment right to a fair and impartial jury, does not preclude harmless error review. Did the Colorado Supreme Court's process for determining a *per se* prejudice where a Bible was present during the last step of the death penalty deliberations improperly create a new constitutional structural error because it would foreclose or prevent harmless error review in every case where that error occurred?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The crimes, convictions, and death sentences at issue	2
B. The appellate procedural history and the stage of proceedings when the federal questions sought to be reviewed were raised	4
REASONS FOR GRANTING THE WRIT	10
A. The Colorado Supreme Court's decision that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision improperly undermined the jury's Sixth and Eighth Amendment responsibilities	11
1. A juror's reading of a verse from a Bible to other jurors in the course of penalty phase deliberations in a capital case, if not used as an extrajudicial code, does not automatically conflict with, and may be consistent with the Eighth Amendment's requirement that a death verdict be the product of a reasoned moral response	11

TABLE OF CONTENTS – Continued

Page

2. The Colorado Supreme Court's holding erroneously assigned a *per se* prejudice analysis to the presence of a Bible during jury death penalty deliberations 15

B. The Colorado Supreme Court's decision that the mere introduction of actual biblical text during death penalty deliberations was prejudicial, improperly created a new constitutional structural error because it would foreclose harmless error review in every case where that error occurs 19

C. This Court should resolve conflicting decisions of state and federal courts concerning whether exposure to biblical passages constitutes *per se* extraneous prejudicial information that violates a defendant's Sixth Amendment right to a fair trial 24

CONCLUSION 26

APPENDICES:

Colorado Supreme Court Opinion: *In re People v. Harlan*, 109 P.3d 616 (Colo. April 18, 2005) A1

District Court Order Granting Defendant's Motion to Vacate Death Sentence (May 23, 2003) A54

Defendant's Motion to Vacate the Death Sentence Due to Jurors' Use of Bible During Penalty Phase Deliberations (October 25, 1995) A98

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991)... 20, 21, 23, 24

Barclay v. Florida, 463 U.S. 939 (1983)..... 12

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... 21

Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001)..... 25

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 6, 17, 18

California v. Brown, 479 U.S. 538 (1987)..... 11

California v. Ramos, 463 U.S. 992 (1983)..... 11

Chapman v. California, 386 U.S. 18 (1967)..... 22

Clemons v. Mississippi, 494 U.S. 738 (1990)..... 21

Glossip v. State, 29 P.3d 597 (Okl. Cr. App. 2001)..... 24, 25

Grooms v. Comm., 756 S.W.2d 131 (Ky. 1988)..... 24, 25

In re People v. Harlan, 54 P.3d 871 (Colo. 2002)..... 5

In re People v. Harlan, 109 P.3d 616 (Colo. 2005)..... 1, 24

Jones v. Kemp, 706 F.Supp. 1534 (D.C.Ga. 1989)..... 13

Lenz v. Warden of the Sussex I State Prison, 593 S.E.2d 292 (Va. 2004)..... 24, 25

Mitchell v. Esparza, 540 U.S. 12 (2003)..... 21, 22

Morgan v. Illinois, 504 U.S. 719 (1992)..... 19

Parker v. Gladden, 385 U.S. 363 (1966)..... 16

People v. Danks, 82 P.3d 1249 (Cal. 2004)..... 24, 25

People v. Dunlap, 975 P.2d 723 (Colo. 2000)..... 6

TABLE OF AUTHORITIES – Continued

Page

People v. Harlan, 8 P.3d 448 (Colo. 2000) 2, 3, 4, 19, 23

People v. Wadle, 97 P.3d 932 (Colo. 2004) 16

Remmer v. United States, 347 U.S. 227 (1954) 16

Ring v. Arizona, 536 U.S. 584 (2002) 18

Rose v. Clark, 478 U.S. 470 (1986) 21, 23

Rushen v. Spain, 464 U.S. 114 (1983) 20

Satterwhite v. Texas, 486 U.S. 249 (1988) 11, 21

Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996) 21, 23

Smith v. Phillips, 455 U.S. 209 (1982) 16

State v. Harrington, 627 S.W.2d 345 (Tenn. 1981) 24, 25

Tuilaepa v. California, 512 U.S. 967 (1994) 12

Turner v. Louisiana, 379 U.S. 466 (1965) 16

United States v. Davis, 60 F.3d 1479 (10th Cir. 1995) 23

United States v. Hornung, 848 F.2d 1040 (10th Cir. 1988) 23

United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) 13

United States v. Neder, 527 U.S. 1 (1999) 20, 21, 22

United States v. Olano, 507 U.S. 725 (1993) 16, 20

United States v. Prime, 363 F.3d 1028 (9th Cir. 2004) 22

Vigil v. Zavaras, 298 F.3d 935 (10th Cir. 2002) 22

Wainwright v. Witt, 469 U.S. 412 (1985) 19

TABLE OF AUTHORITIES – Continued

Page

Wiser v. People, 732 P.2d 1139 (Colo. 1987)..... 16

Woldt v. People, 64 P.3d 256 (Colo. 2003)..... 18

STATUTES

28 U.S.C. § 1257(a)..... 1

OTHER AUTHORITIES

Matthew Henry, *Commentary on the Whole Bible* 2227 (Hendrikson Publishers 1991) (1721)..... 9

RULES

FRE 606(b)..... 16

Sup. Ct. R. 10(b)..... 10

Sup. Ct. R. 10(c)..... 10

CONSTITUTIONAL PROVISIONS

Eighth Amendment.....2, 10, 11, 19

Fourteenth Amendment..... 2, 15, 16, 18

Sixth Amendment.....*passim*

PETITION FOR A WRIT OF CERTIORARI

The District Attorney for the Seventeenth Judicial District, on behalf of the People of the State of Colorado, respectfully petitions for a writ of certiorari to review the judgment and opinion of the Colorado Supreme Court entered in this case.

OPINION BELOW

The Colorado Supreme Court's opinion is reported as *In re People v. Harlan*, 109 P.3d 616 (Colo. 2005). A copy is attached as Appendix ("App.") A1-A53. A Copy of the trial court order at issue is attached as App. A54-A97.

JURISDICTION

The Colorado Supreme Court entered its judgment on March 28, 2005, and entered an order denying petitioner's motion for rehearing on April 18, 2005. Colorado invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ."

The Eighth Amendment to the United States Constitution provides: "cruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The crimes, convictions, and death sentences at issue.

On February 12, 1994, at approximately 2:00 a.m., Rhonda Maloney finished her shift at Harrah's Casino in Central City, Colorado. She took a shuttle bus to her car, which was in the Golden bus station parking lot, arriving there between 3:00 and 3:30 a.m. At approximately 5:45 a.m., Jacquie Creazzo was driving eastbound on I-76. Taking the ramp onto northbound I-25, Creazzo saw two cars parked on the side of the highway; she slowed down to see if there was a problem or if there had been an accident. Maloney got out of the passenger side of one of the cars and drew Creazzo's attention to her. Creazzo stopped her car slightly past Maloney, and, as Creazzo was backing up, Maloney jumped into the car. *People v. Harlan*, 8 P.3d 448, 458 (Colo. 2000), *cert. denied*, 532 U.S. 979 (2001) ("Harlan I").

Maloney and Creazzo drove northbound on I-25. Robert Harlan began to pursue them in one of the cars

that had been parked by the road. Maloney told Creazzo that she needed help to escape from a man with a gun who was going to kill her and that he had raped her for two hours. *Id.*

As Harlan pursued Creazzo and Maloney, his car drew up alongside Creazzo's and Harlan fired several shots into the car. Several bullets hit Creazzo in the knee, spine, and face. Creazzo lost control of her car, which swerved across the median and stopped on the front lawn of the Thornton Police Department. Harlan parked his car and approached Creazzo and Maloney. Harlan pulled Maloney and her belongings from the car, warning Creazzo not to tell anyone what had happened and threatening to kill her if she did. Harlan then dragged Maloney to his car and drove away. *Id.*

On February 15, 1994, police arrested Harlan in connection with Creazzo's shooting and Maloney's abduction. Harlan's father found evidence that incriminated his son in the murder and turned that evidence over to the police. App., A40. Maloney's body was found on February 19, 1994; an autopsy revealed that she suffered several skull and facial fractures, wounds consistent with sexual assault, and other severe injuries. The autopsy also established that Maloney died from a gunshot wound to the head. *Harlan I*, 8 P.3d at 458.

On June 20, 1995, a jury found Harlan guilty of:

(1) first degree murder of Rhonda Maloney (after deliberation);

(2) criminal attempt to commit first degree murder of Rhonda Maloney, with a special finding that the defendant used, possessed, or threatened the use of a deadly weapon;

> (3) second degree kidnapping of Rhonda Maloney, with a special finding that Rhonda Maloney was a victim of sexual assault and robbery, and that the defendant committed the kidnapping through use of a deadly weapon;
>
> (4) first degree murder of Rhonda Maloney (felony) with the predicate crime of kidnapping;
>
> (5) criminal attempt to commit first degree murder of Jacquie Creazzo, with a special finding that the defendant used, possessed, or threatened the use of a deadly weapon; and
>
> (6) first degree assault of Jacquie Creazzo.

Id., at 459.

On July 1, 1995, the jury sentenced Harlan to death. In making its sentencing findings, the jury found beyond a reasonable doubt that: (1) four statutory aggravating factors applied to Harlan's murder of Rhonda Maloney; (2) Harlan's mitigation evidence did not outweigh those aggravating factors; and (3) death was the appropriate penalty for Harlan's crime.

B. The appellate procedural history and the stage of proceedings when the federal questions sought to be reviewed were raised.

Harlan appealed to the Colorado Supreme Court. On April 20, 2001, the Colorado Supreme Court issued a mandate affirming the sentence and conviction and instructing the District Court to vacate the sentence for one attempted murder count. *Harlan I*, 8 P.3d 448. The trial court's decision on August 20, 2001, disqualifying the Public Defender's Office as Harlan's counsel, was the

subject of the Supreme Court's review in *In re People v. Harlan*, 54 P.3d 871 (Colo. 2002) ("Harlan II").

In October 1995, Harlan's counsel filed a motion to the District Court entitled "Motion to Vacate the Death Sentence Due to Juror's Use of the Bible During Penalty Phase Deliberations" ("the Bible Motion"). App., A98-A117. That motion included an affidavit alleging that some jurors had brought Bibles into their penalty phase deliberations. Harlan claimed that the jurors' purported use of the Bible violated his constitutional rights, specifically, his due process rights, his right to counsel, his right to confrontation, his right to remain silent, his privilege against self-incrimination, his right to trial by jury, his right to compulsory process, his protection against *ex post facto* laws, his equal protection rights, his right to appeal, and his protection against cruel and unusual punishment.

The Bible Motion was not heard until April 2003, after the District Court finally regained jurisdiction from the Colorado Supreme Court. The District Court held an evidentiary hearing beginning on April 14, 2003 and concluding on April 18, 2003, in which testimony concerning incidents surrounding the deliberations in the penalty phase was elicited from investigators and the jurors in the case.

The District Court issued its order on May 23, 2003. The District Court's legal conclusions were based, in part, upon federal constitutional law, guaranteeing the right to a fair and impartial jury. The District Court held that, "The use of these biblical passages violated the Defendant's right to have his sentence decided on the basis of the evidence and the law set forth in the trial court's Instructions of Law." App., A94. The District Court also

held that "The death penalty . . . must be imposed in a **constitutional** manner. Jury resort to biblical code has no place in a **constitutional** death penalty proceeding." (emphasis added). App., A97.

The People appealed the District Court's decision to the Colorado Supreme Court, arguing some of the same issues it brought before the District Court. App., A58. The prosecution argued that the Sixth Amendment does not preclude harmless error review of jury misconduct in a capital case. The prosecution also argued that the law promulgated by the United States Supreme Court under the Eighth Amendment on the moral nature of the sentencing determination in capital cases is the ultimate responsibility of the jury.

The Colorado Supreme Court issued its opinion on March 28, 2005, and a modified opinion upon denial of the Petition for Rehearing on April 18, 2005. See App., A1-A53. In its opinion, the Colorado Supreme Court did not address the prosecution's federal constitutional arguments. See App., A1-A53. The court did, however, cite *Caldwell v. Mississippi*, 472 U.S. 320 (1985), through *People v. Dunlap*, 975 P.2d 723 (Colo. 2000), for the proposition under the Eighth Amendment that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." App., A35.

The Colorado Supreme Court determined that written biblical passages, such as Leviticus 24:20-21 and Romans 13:1, would influence a typical Colorado juror to vote for the death penalty. App., A35. A central component of the Court's holding was its finding that jurors were exposed to

"an eye for an eye" passage directly from a Bible physically present in the jury room during deliberations.

The first mention of "eye for an eye," however, came during Harlan's voir dire of juror Jesus Cordova. When asked whether he ascribed to the idea of an eye for an eye, juror Cordova replied, "No, I can't." Rather, juror Cordova stated that his philosophy, which had been shaped by his readings of the Bible, was "to be as fair as I can in everything I do." App., A50. But it does not take a Bible reader or even a religious person to be familiar with the passage "an eye for an eye." As the dissent in Harlan III pointed out, the passage "is a cultural precept in contemporary society. . . . Religious and non-religious individuals alike are familiar with the phrase and its meaning as part of their general knowledge." App., A50.

A factual understanding of the introduction of any "eye for an eye" passage is critical to a determination of prejudice against the defendant in this case. The Colorado Supreme Court found that one or more jurors were exposed to two written Biblical passages consisting of Leviticus 24:20-21 ("Fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death") and Romans 13:1 ("Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God") during death penalty deliberations. See App., A1-A53. However, the ruling overstates the manner and presence of the Leviticus "eye for an eye"-type passages while at the same time, devaluing the significance of the Romans passage concerning a citizen's duty to obey the civil laws.

Juror Lana Ochoa testified that she brought a bible into the jury deliberation room on Saturday, July 1, 1995. App., A69. Juror Ochoa testified that she "looked up" or "researched" both Leviticus 24:20-21 and Romans 13:1 in her hotel room the night before. App., A23-A24. Juror Ochoa testified that she did this because:

> [T]here was a gentleman (juror Jesus Cordova) who couldn't make a decision because he said his faith was standing in the way and I knew that there was scripture in the bible that let us – that we are to obey the government, we are to obey the laws of the land and as a Christian you are to obey and this is what the law says, so this is what you should – so I was looking that up. App., A64.

In fact, the record indicates that juror Ochoa repeatedly states that her focus was on Romans 13:1 when talking about what she actually "showed" to juror Cordova in the deliberation room. She says, "The Bible says obey the laws of the land," App., A47, fn. 7, and "[Cordova] was reluctant to obey the laws of the land." App., A70.

The Colorado Supreme Court cites conflicting interpretations of the meaning of Romans 13:1. First, the majority admits that the passage relates a "citizen's duty to obey the law." App., A11. Subsequently, however, the majority states that, "The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty." App., A34. Naturally, obeying the law and obedience to the government, in this case the prosecution, are very different interpretations. As noted in the dissent:

> [T]he plain meaning and well-accepted interpretation of [Romans 13:1] is that individuals are to

> obey the laws of their nation. *See* Matthew Henry, *Commentary on the Whole Bible* 2227 (Hendrikson Publishers 1991) (1721). Thus, in effect, this passage instructs individuals to follow the laws of Colorado. The laws of Colorado do not mandate the death penalty, but rather provide a four-step process that guides jurors in reaching a decision on sentencing in capital cases. App., A49.

The majority position of the Colorado Supreme Court, however, ignores the fact that the jurors were repeatedly instructed as to the law and Colorado's four-step process. The fact that only the written Romans passage was introduced from the Bible into deliberations supports the fact that the jurors intended to, and did, follow Colorado's death penalty law. Furthermore, as the dissenting opinion noted, the testimony reveals that the jurors received and followed the law provided to them by the court. App., A49-A50.

The record also indicates that any biblical discussions in the jury room took up a proportionally small amount of the jury's deliberations. App., A47. Jurors Barbara Smith and Hazel Taylor testified that someone attempted to mention something about the Bible or religion during deliberations, but that the discussion was shut down immediately. App., A74. Juror Smith testified that the complete discussion lasted less than five minutes. App., A74. As such, the record does not support the suggestion that the jury replaced Colorado law with biblical code. In fact, as the dissent noted, the sworn testimony revealed "that not even one of the jurors was influenced by these biblical passages to vote for the death penalty. . . ." App., A42-A43.

Furthermore, the record clearly indicates that each juror who heard any reference to biblical passages during

deliberations also testified that they were already considering step four of Colorado's statutory four-step process at the time the references were made. App., A87-A89. Jurors Lorrie Salter, Roxie McCullough, Barbara Smith, Ridawn Yantis-Cummings, Marietta Nowakowski, Steven Wright, Ann Trujillo, and Lana Ochoa each testified that they had made their own determinations as to steps one through three, the eligibility phase, before any mention of the Bible or religion was made. App., A87-A89. As such, the jurors were, at the very least, in the fourth step of their deliberations – the step involving the jurors' profoundly moral determination of the appropriateness of the death penalty for Harlan.

REASONS FOR GRANTING THE WRIT

This case concerns important questions of federal constitutional law involving the Sixth Amendment right to an impartial jury and the Eighth Amendment requirement for a reasoned moral response in imposing a death sentence. As described below, state courts of last resort and a federal circuit court have issued conflicting decisions on these issues. These issues have not been, but should be, settled by this Court. Sup. Ct. R. 10(b), (c).

The first issue concerns whether the introduction of the Bible into death penalty jury deliberations is consistent with the Eighth Amendment's requirement for a reasoned moral response or whether it *per se* constitutes extraneous prejudicial information which violates a defendant's Sixth Amendment right to a fair trial, as applied to the States by the Fourteenth Amendment's due process clause, in all cases. The second issue is whether, assuming a Sixth Amendment constitutional violation

involving introduction of biblical texts occurs in a capital sentencing proceeding, does constitutional harmless error review apply.

A. The Colorado Supreme Court's decision that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision improperly undermined the jury's Sixth and Eighth Amendment responsibilities.

1. A juror's reading of a verse from a Bible to other jurors in the course of penalty phase deliberations in a capital case, if not used as an extrajudicial code, does not automatically conflict with, and may be consistent with the Eighth Amendment's requirement that a death verdict be the product of a reasoned moral response.

The Eighth Amendment defines the parameters of a jury's deliberations in a trial's death penalty phase. "Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime." *Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor concurring) (the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.)).

The Court described the difference in the jury's role in the penalty phase of a capital case from the guilt phase in *California v. Ramos*, 463 U.S. 992, 1008 (1983):

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting those defendants who will be sentenced to death." [Citation and footnote omitted.]

Indeed, the Court pointed out in *Tuilaepa v. California*, 512 U.S. 967, 979 (1994), that jurors can be given "unbridled discretion in determining whether the death penalty should be imposed after it is found that the defendant is a member of the class made eligible for the death penalty."

The reason for this broad grant of discretion is found in the nature of the verdict the jury renders at the end of the penalty phase. The decision on whether to sentence someone to death is fundamentally a moral one and the morality exercised by jurors comes from their experiences in life. Chief Justice Rehnquist, writing for the plurality in *Barclay v. Florida*, 463 U.S. 939, 950-951 (1983), explained the moral component in death penalty decision-making:

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important

> judgment to decide in a vacuum, **as if he had no experiences** . . . We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. **But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability.** As long as that discretion is guided in a constitutionally adequate way . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more. [Citations omitted; emphasis supplied.]

Jurors are expected to bring their backgrounds and common sense with them into the jury room when deciding issues of guilt or innocence. The law also requires they bring their ideas of right and wrong with them when they sit on death penalty cases. As the Court of Appeals noted in *United States v. McKinney*, 429 F.2d 1019, 1022-1023 (5th Cir. 1970), *rehearing granted and judgment affirmed*, 434 F.3d 831 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1970) (not a death penalty case) jurors are expected to bring their "philosophies . . . wisdom [and] . . . experience" into the jury room.

This would, as various courts have observed, include their religious experience. As the federal district judge noted in *Jones v. Kemp*, 706 F.Supp. 1534, 1558-1560 (D.C.Ga. 1989), "[t]he court in no way means to suggest that jurors cannot rely on their **personal faith and**

deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen." (emphasis supplied).

The dissent in this case noted that "the jurors were required to make an overwhelming moral decision, namely whether the death penalty was an appropriate punishment. . . ." App., A49. It further pointed out that the trial court instructed the jurors to "apply [their] *reasoned judgment* in deciding whether the situation calls for life imprisonment or the imposition of the death penalty" (emphasis added) and that the trial court further told the jurors that "you must still make a further *individual* moral assessment of whether you have been convinced beyond a reasonable doubt that the death penalty, instead of life in prison, is the appropriate punishment . . . in this case" (emphasis added). Thus, as the dissent concluded, the jury instructions specifically directed the jurors to consider their moral and religious precepts, as well as their general knowledge, when making a reasoned judgment about whether or not to impose the death penalty. App., A49.

In her dissenting opinion, Justice Rice recognized that the biblical passages at issue here constituted either a part of the jurors' moral and religious precepts or their general knowledge, and therefore were relevant to the jurors' court-sanctioned individual moral assessment. Of particular importance is that the jurors' reading of Romans 13:1 admonished them to follow the laws of Colorado. App., A49.

The laws of Colorado, as the dissent reasoned, do not mandate the death penalty, but rather provide a four-step process that guides jurors in reaching a decision in capital cases. App., A49. Because the court and counsel instructed

the jurors to comply with the four-step process, there was no reasonable possibility that the biblical passage instructing them to follow Colorado law prejudiced the defendant.

Similarly, "an eye for an eye" is a familiar expression in common usage and within general knowledge in our society to both religious and non-religious individuals. It is not just a biblical quote. Even religious individuals may not follow it literally, as the voir dire responses of juror Cordova revealed. App., A50.

In this case, where the biblical passages were not used as an extrajudicial code to supplant Colorado law, their use did not prejudice the process for reaching a reasoned moral response and thus did not conflict with Eighth Amendment principles.

While this Court's Eighth Amendment jurisprudence has repeatedly described the decision whether death is the appropriate sentence as requiring a "reasoned moral response," the contours of what jurors may or may not constitutionally employ in reaching that moral decision remains largely undefined. This Court should grant a writ of certiorari to provide further guidance in this important area.

2. The Colorado Supreme Court's holding erroneously assigned a *per se* prejudice analysis to the presence of a Bible during jury death penalty deliberations.

Allegations of the introduction of extraneous prejudicial information into jury deliberations raise the issue of whether the Sixth Amendment right to a fair trial, as applied to the States by the Fourteenth Amendment's due

process clause, has been violated. *E.g.*, *Turner v. Louisiana*, 379 U.S. 466, 471-474 (1965) ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."); *Parker v. Gladden*, 385 U.S. 363, 364 (1966) ("We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment."); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the cases solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.")

In Colorado, *Wiser v. People*, 732 P.2d 1139 (Colo. 1987) and *People v. Wadle*, 97 P.3d 932 (Colo. 2004) set up procedures for protecting this constitutional right. In *Wadle*, Justice Coats recognized the federal constitutional basis for allegations of juror exposure to extraneous information. *Wadle*, 97 P.3d at 935-936 (citing *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Remmer v. United States*, 347 U.S. 227, 229 (1954); and subsequent holdings in *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993); and adoption of FRE 606(b)).

In its ruling, the Colorado Supreme Court concluded that the mere presence of a Bible in a jury room during deliberations was prejudicial when it concluded:

> In a community where "Holy Scripture" has factual and legal import for many citizens and the actual text introduced into the deliberations without authorization by the trial court plainly instructs mandatory imposition of the death penalty, contrary to state law, its use in the jury room prior to the penalty phase verdict was prejudicial to Harlan. App., A39.

The Court acknowledged that an individual juror may rely on and discuss with other jurors "his or her religious upbringing, education, and beliefs in making the extremely difficult 'reasoned judgment' and 'moral decision' he or she is called upon to make in the fourth step of the penalty phase under Colorado law." App., A37. The Court, however, held "*only* that it was improper for a juror to bring the written Leviticus and Romans texts during deliberations . . . " (emphasis added). App., A37.

In other words, the Court's reasoning suggests that the same passages, if memorized, could have been properly discussed by the jurors. The Court's ruling thus created a *per se* presumption of prejudice from the mere presence of written biblical texts in a death penalty deliberation room which does not arise when the jurors are familiar with or can even recite from memory and discuss the same passages without the actual text present. The Court's opinion, however, does not explain whether religious texts other than the Bible, like the Koran, the Torah, or other sacred religious texts, would also be deemed *per se* prejudicial. Nor does the decision indicate what criteria should be used to determine which particular books have sufficient factual and legal import to render them prejudicial.

The Colorado Supreme Court citing *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), recited the

admonition that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The Court then reasoned that biblical texts mandating the death penalty would affect a typical juror more persuasively than the prosecutor's argument in *Caldwell* that the jury need not be concerned about imposing the death sentence because it would be automatically appealed. App., A35.

The Court, however, denied that it was suggesting that the jurors were unable to distinguish between religious and state law or that consideration of the text actually produced the death penalty verdict. The Court thus did not conclude that actual prejudice occurred but, contrary to any evidence that typical jurors would be incapable of making the distinction between Colorado law and biblical texts, merely assumed that one would automatically be influenced by the presence of the Bible. App., A35. In fact, as noted above, the sworn testimony revealed that none of the jurors were actually influenced by the biblical passages to vote for the death penalty. App., A42-A43.

The Sixth Amendment requires that juries make the determinations necessary to impose death sentences. *Ring v. Arizona,* 536 U.S. 584 (2002); *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (Colorado's three-judge panel system deemed unconstitutional under *Ring*). In order to have made it to the sentencing phase of a trial, jurors must have passed through a jury selection scheme, required by the Sixth Amendment's guarantee of an impartial jury as applied to the State's under the Fourteenth Amendment's due process clause, that excludes jurors whose beliefs

would "prevent or substantially impair" the performance of their duties as jurors. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Harlan I*, 8 P.3d 448, 461 (Colo. 2000).

This concept ensures that jurors whose beliefs fall on both ends of the spectrum, meaning those whose beliefs substantially impair them from imposing a death sentence or from imposing a life sentence, do not serve. This elimination process applies to prospective jurors whose decision-making would be impacted by personal beliefs founded on the Bible, the Koran, the Torah, or any other source, or life experience in general.

A jury that has undergone this selection process, and thus is deemed to have satisfied Sixth Amendment standards for impartiality, is uniquely qualified to render that evaluation. The Court's application of a Bible *per se* prejudice standard improperly preempted the jury's function under the Sixth and Eighth Amendments by taking the ultimate decision out of their hands and placing it under the Court's control.

B. The Colorado Supreme Court's decision that the mere introduction of actual biblical text during death penalty deliberations was prejudicial improperly created a new constitutional structural error because it would foreclose harmless error review in every case where that error occurs.

While the presence of extraneous information can lead to a presumption of prejudice, there must be a determination of prejudice before a conviction can be revoked. A rule of *per se* prejudice is inconsistent with the idea that, "If no harm resulted from this intrusion, reversal would be

pointless." *United States v. Olano*, 507 U.S. 725, 738 (1993). *See also*, *Rushen v. Spain*, 464 U.S. 114, 117-118 (1983) ("At the same time and without detracting from the fundamental importance of [a defendant's right to counsel], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional deprivations] are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests.")

There are two kinds of error: structural error and trial error. *Arizona v. Fulminante*, 499 U.S. 279 (1991). A structural error is a "structural defect affecting the framework within which the trial proceeds," whereas trial errors occur in the trial process itself. *Id.*, at 310. "Trial error" is error which occurred during presentation of the case to jury and may therefore be quantitatively assessed in context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. *Id.*, at 307-308. The Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. *Id.*, at 306.

Error has been found to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." These include complete denial of the right to counsel, trial before a biased judge, improper exclusion of a member of the defendant's ethnic group from a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction. *United States v. Neder*, 527 U.S. 1, 8 (1999). These constitutional violations defy harmless-error review because

they "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 470, 577 (1986). Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Rose*, at 577-578; *Neder*, at 8-9.

Expanding the list of structural errors can be a dangerous endeavor. *Sherman v. Smith*, 89 F.3d 1134, 1138 (4th Cir. 1996) (citing *Fulminante* at 310). There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, courts should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of *every* criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair. *Sherman, supra*, at 1138.

The fact that a constitutional violation occurred in the context of a capital sentencing proceeding does not preclude harmless-error review. *Mitchell v. Esparza*, 540 U.S. 12, 16-17 (2003) (unconstitutional failure to instruct jury on all statutory elements of offense in capital case.) A number of harmless-error cases have involved capital defendants. *Id.*, at 17 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S.

249 (1988) (unconstitutional admission of psychiatric evidence at sentencing stage)). The *Esparza* Court reaffirmed the principle that a constitutional error is harmless, even in a capital case, when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder, supra,* at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Colorado Supreme Court essentially holds that "due to the factual and legal import" the Bible has for many citizens, introduction of the actual text is automatically prejudicial in a way that memorized or discussed biblical texts are not. In its prejudice analysis, the Court does not employ or consider factors that the Ninth and Tenth Circuits have listed as relevant objective criteria for inquiring whether a jury's exposure to extraneous materials is prejudicial. *See United States v. Prime*, 363 F.3d 1028, 1037-38 (9th Cir. 2004) and *Vigil v. Zavaras*, 298 F.3d 935, 941 (10th Cir. 2002). These include . . . "2) the length of time it was available to the jury; 3) the extent to which the jury discussed and considered it . . . " *Prime*, 363 F.3d at 1037-1038. Other relevant factors include: "1) the degree to which the jury discussed and considered the extrinsic information; 2) the extent to which the jury had difficulty reaching a verdict prior to receiving the improper evidence" and "5) the strength of the legitimate evidence; and 6) whether the extrinsic evidence merely duplicates evidence properly before the jury." *Vigil v. Zavaras*, 298 F.3d at 941.

The Colorado Supreme Court considered limited factors based solely on the nature of the Bible itself and whether the jury was exposed to it before reaching a verdict, no matter how minimally, as its basis for concluding that there was prejudicial error requiring reversal of

the jury's penalty verdict. Under this reasoning the mere introduction of biblical texts into the jury room during deliberations would always defy harmless-error analysis. The Court has thus in essence created a new structural error to add to the short list of structural errors for which a reviewing court cannot quantitatively assess the effect of the error "in the context of other evidence presented" at trial. *Fulminante*, at 307-308.

Juror misconduct involving introducing extraneous materials, even a Bible, into the jury room, however, "does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction." *See Sherman v. Smith*, 89 F.3d at 1138, citing *Rose*, 478 U.S. at 579. Unlike the complete denial of counsel and other structural errors, which affect the "entire conduct of the trial from beginning to end," introduction of biblical texts into the jury room can be discrete moments in the course of an otherwise fair trial. *See Fulminante*, 499 U.S. at 309. Because it cannot be said that juror exposure to a Bible would render every trial in which it occurs unfair, it would be an unreasonable overextension to remove such errors from harmless error analysis.

The most common means of demonstrating the harmlessness of an extraneous contact or information is to show the existence of "overwhelming evidence of [the] defendant's guilt." *United States v. Davis,* 60 F.3d 1479, 1485 (10th Cir. 1995) (citing *United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988)). The Colorado Supreme Court had previously concluded that overwhelming evidence was presented at trial to establish the defendant's guilt for the first degree murder charge and that the prosecution had proved three statutory aggravating factors at trial. *Harlan I*, 8 P.3d 448, 498-499 (Colo. 2000). A harmless error

analysis requires the reviewing court to quantitatively assess the effect of any constitutional error "in context of other evidence" at trial. *Fulminante*, at 307-308. The Colorado Supreme Court's decision improperly precluded that constitutional analysis in this case.

C. This Court should resolve conflicting decisions of state and federal courts concerning whether exposure to biblical passages constitutes *per se* extraneous prejudicial information that violates a defendant's Sixth Amendment right to a fair trial.

Six state courts of last resort and one federal circuit court of appeals have issued conflicting decisions on the important questions of federal constitutional law presented in this case. *People v. Danks*, 82 P.3d 1249 (Cal. 2004), *cert. denied*, 125 S.Ct. 441 (2004); *Lenz v. Warden of the Sussex I State Prison*, 593 S.E.2d 292 (Va. 2004), *cert. denied*, 124 S.Ct. 2933 (2004); *In re People v. Harlan*, 109 P.3d 616 (Colo. 2005); *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002); *Glossip v. State*, 29 P.3d 597 (Okl. Cr. App. 2001); *Grooms v. Comm.*, 756 S.W.2d 131 (Ky. 1988); *State v. Harrington*, 627 S.W.2d 345 (Tenn. 1981), *cert. denied*, 457 U.S. 1110 (1982).

In particular, the California Supreme Court has held that it was not prejudicial misconduct for jurors to consult their pastors, read the Bible, bring photocopies of biblical passages and discuss biblical passages in the jury room during penalty phase deliberations of a capital murder trial. *People v. Danks*, 82 P.3d 1249 (Cal. 2004). In contrast to the Colorado Supreme Court's conclusion that jurors

would be presumptively prejudiced by exposure to written biblical texts during death penalty deliberations, the *Danks* Court wrote:

> While this case involves religious beliefs, an intensely private area, we are unwilling to ascribe to any perceived stereotype that jurors who receive advice from Christian spiritual leaders, or are exposed to Biblical passages, per se suffer a diminished sense of responsibility for their penalty verdict, and are automatically rendered incapable of fairly evaluating the evidence and law before them.

Id., at 1277.

The Supreme Court of Virginia and the Fourth Circuit Court of Appeals have also made clear that it is not prejudicial for jurors to use and read from a Bible during death penalty deliberations when those readings do not constitute an effort to replace state law with biblical code. *See Lenz v. Warden of the Sussex I State Prison*, 593 S.E.2d 292 (Va. 2004) and *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001).

In contrast, the state supreme courts of Oklahoma, Kentucky, and Tennessee have, in dicta, indicated that a juror's use of a Bible during death penalty deliberations may be prejudicial to a defendant. *See Glossip v. State*, 29 P.3d 597 (Okl. Cr. App. 2001); *Grooms v. Comm.*, 756 S.W.2d 131 (Ky. 1988); *State v. Harrington*, 627 S.W.2d 345 (Tenn. 1981). Each of those courts, however, declined to fully develop those conclusions on the merits, and instead decided those cases on other grounds.

As such, the current conflicting case law leaves much unresolved in the area of a jury's role in death sentence determinations and whether or not they are presumptively prejudiced against a defendant by exposure to a Bible during deliberations.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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July 2005

Supreme Court of Colorado.
In re: Plaintiff-Appellant:
the PEOPLE of the State of Colorado,
v.
Defendant-Appellee: Robert Eliot HARLAN.
No. 03SA173.

March 28, 2005.
As Modified on Denial of Rehearing April 18, 2005.*

Don Quick, District Attorney, Seventeenth Judicial District, Michael J. Milne, Senior Deputy District Attorney, Bradley V. Varmo, Deputy District Attorney, Brighton, Steven L. Bernard, Chief Deputy District Attorney, Nineteenth, Judicial District, Acting as Special Deputy District Attorney, for the Seventeenth Judicial District, Greeley, for Plaintiff-Appellant.

David S. Kaplan, Colorado State Public Defender, Kathleen A. Lord, Chief Appellate Deputy Public Defender, Denver, for Defendant-Appellee.

Burns, Figa & Will, P.C., Michael J. Norton, Englewood, for Amicus Curiae in Support of Plaintiff-Appellant.

HOBBS, Justice.

Pursuant to C.A.R. 21, we review the prosecution's challenge to the trial court's judgment vacating a jury verdict imposing the death penalty on Robert Eliot Harlan and imposing a sentence of life imprisonment without the possibility of parole. We uphold the trial court's order and judgment, and discharge the rule.

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* Justice KOURLIS and Justice RICE would grant the Petition.

Previously, we affirmed Harlan's death sentence. *People v. Harlan*, 8 P.3d 448 (Colo.2000). In 1995, a jury found Harlan guilty of raping and murdering Rhonda Maloney and shooting Jaquie Creazzo, who tried to rescue Maloney when she escaped from Harlan's car. In pursuit, Harlan shot Creazzo and left her paralyzed for life. He then seized Maloney from Creazzo's car, drove away with her, and proceeded to savagely beat and ultimately kill her. We upheld Harlan's conviction and death sentence on appeal. *Id.* at 501.

In that opinion, we expressed particular concern about the voir dire that resulted in the jury's selection. Several of the jurors who were seated had expressed views favoring the death penalty for all persons convicted of first degree murder. However, they all answered in response to follow-up questions that they would listen to the evidence, follow the court's legal instructions in the guilt and penalty phases of the trial, apply the four-step process for the penalty phase as the trial court would instruct, and not automatically vote for the death penalty. While we were "deeply troubled by the number of times the trial court failed to resolve contradictory or equivocal statements by jurors," *id.* at 465, and characterized the voir dire as "inherently problematic," *id.* at 468, we concluded that the trial court's voir dire rulings were supported by the evidence and were constitutionally sufficient. *Id.*

After considering Harlan's numerous legal contentions, accepting some but rejecting most, we found no legal basis on which to set aside the jury's death penalty verdict. We then proceeded with our duty to independently review the verdict under former section 16-11-103(6)(a) and (b),

8A C.R.S. (Cum.Supp.1994).[1] *Id.* at 498-501. This two-part inquiry requires us to find that the death penalty is appropriate under the circumstances of the case and that the jury did not impose it under the influence of passion, prejudice, or any other arbitrary factor.

As to this first inquiry, we upheld the propriety of the death sentence based upon the evidence of Harlan's heinous acts:

> In light of the duration during which the defendant terrorized his victim and her would-be rescuer; the degree of violence he inflicted on Maloney before her death; and the extent to which she suffered, we conclude that the nature of the defendant's offense is comparable to cases in which we have upheld the propriety of the death sentence.

Id. at 498 (internal citations omitted).

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[1] Former subsection (6), now relocated to 18-1.3-1201(6), C.R.S. (2004) without modification to relevant portions, provided:

> (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, *including the sufficiency and accuracy of the information on which it was based.* The procedures to be employed in the review shall be as provided by supreme court rule.
>
> (b) *A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor* or that the evidence presented does not support the finding of statutory aggravating circumstances.

(emphasis added).

As to the second inquiry, whether passion, prejudice, or some other arbitrary factor influenced the death penalty verdict, we examined Harlan's contention that racial bias may have been a factor in the imposition of the death sentence. We determined that the record as a whole supported the finding that "racial prejudice did not undermine the fundamental fairness of the defendant's trial." *Id.* at 499.

Accordingly, we upheld the jury's death penalty verdict and remanded the case to the trial court for further proceedings. *Id.* at 501. Subsequently, the trial court took up Harlan's motion to vacate his death sentence due to jury misconduct. Harlan alleged that the jury introduced one or more Bibles into the jury room during deliberations and used the texts to demonstrate an authoritative passage commanding imposition of the death penalty for the crime of murder, all without authorization by the trial court. The evidence adduced at the trial court's hearing shows that: (1) one or more jurors brought a Bible, a Bible index, and hand-written notes containing the location of biblical passages into the jury room to share with another juror during deliberations in the penalty phase of defendant's trial; (2) these extraneous materials contained a passage commanding the death penalty for murderers and another instructing obedience to civil authorities; and (3) these passages were pointed out by at least one juror to another juror before the jury reached its unanimous verdict imposing the death sentence. The trial court concluded that there was a reasonable possiblity [sic] that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan. Therefore, the trial court found that

Colorado's legal standards require reversal of the jury's death sentence verdict in this case.[2]

Because competent evidence in the record supports the trial court's findings of fact and the court's legal conclusions are correct, under CRE 606(b) and applicable case law, we uphold the trial court's order vacating Harlan's death sentence and imposing a sentence of life imprisonment without the possibility of parole.

In light of the trial court's findings, and exercising our independent responsibility to review the death sentence under former section 16-11- 103(6)(b), we can no longer say that Harlan's death sentence was not influenced by passion, prejudice, or some other arbitrary factor. *See Harlan*, 8 P.3d at 499-501.

I.

In 1995, defendant Robert Harlan was tried for the 1994 kidnapping, rape, and murder of Rhonda Maloney and the shooting of Jaquie Creazzo. The prosecution elected to pursue the death penalty. After the trial had commenced, a news broadcast aired the statement of a witness suggesting that Harlan had been involved in another uncharged crime. The court ordered sequestration of the jury.

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[2] The prosecution argues in its brief that the trial court did not make sufficient findings that the Bible materials in the courtroom were improperly introduced and that prejudice resulted from their use. Reviewing the trial court's written ruling, we disagree. The trial court sufficiently addressed and made the required findings, based on competent evidence, which support its legal conclusion vacating the death sentence.

Presentation of evidence concluded, and the jury found Harlan guilty of first degree murder, two counts of attempted first degree murder, two counts of second degree kidnapping, and one count of assault.

On Friday June 30, 1995, the sequestered jury began its penalty phase deliberations. During the course of the trial, the court admonished the jury several times to focus only on the evidence and law presented at the trial and to avoid any outside discussion or information about the case.

During preliminary jury voir dire, the judge instructed the prospective jurors that sentencing phase deliberations, if needed, must focus solely on the evidence presented at trial and that the jury would be required to carefully follow the trial court's instructions:

> During the penalty phase of the trial, if one is necessary, the jurors will decide, based upon the evidence presented at trial and during the penalty phase, and by following carefully the instructions of the Court stating the applicable law, whether the death penalty will or will not be imposed.

When the jury panel had been selected and trial was set to begin, the trial court told the jury that it was to base its decision on the evidence in the case and "nothing else whatsoever:"

> [D]on't discuss this case with anyone.
>
> . . . .
>
> Anything appears on television, turn off the television. Go to another room. . . .
>
> . . . .

> [H]ave somebody look at the newspaper before you do to make sure that nothing in regard to the trial is in the newspaper, and if there is, take that section out and let you see only the sections that don't have reference to the trial in it; and that's not just this trial, that's the criminal justice system as a whole, anything that may be happening in any of the other trials that may be going on around the state or around the nation.
>
> I just want you to come to this court focused on this case ready to listen to the evidence in this case and to *base your decision only on evidence that you get at this trial, nothing else whatsoever.*

(emphasis added).

Before opening statements began, the court admonished the jury that only the evidence presented and the law as explained by the court were appropriate for consideration, even if the jurors disagreed with or did not understand the rules of law:

> Your purpose as jurors is to decide what the facts are and your decision must be *based solely upon the evidence presented in this courtroom.*
>
> It's my job to decide what rules of law apply to the case. *You must follow all the rules as I explain them* to you. You may not follow some and ignore others.
>
> *Even if you disagree with or don't understand the reasons for some of these rules, you must follow them.* You will then apply these rules to the facts which you have determined from the evidence.

(emphasis added).

At the end of the first day of trial, the trial court told the jury not to go looking for facts outside the courtroom:

> *[D]on't try to find out any facts about this case outside this courtroom.*
>
> . . . .
>
> There are going to be reports in the papers. There are going to be reporters. . . . It's going to be in the paper tomorrow morning. Don't read that.
>
> . . . .
>
> There's going to be news, televised reports. . . . Don't watch any of those. Don't let anyone tell you about them.
>
> . . . .
>
> Don't expose yourself to any of that material while this trial is going on.
>
> . . . .
>
> [D]on't read anything about any articles or reports that have to do with the criminal justice system. . . .
>
> . . . .
>
> I don't want you to follow the O.J. Simpson trial. . . . I don't want you to watch Court TV. . . . I want you to focus on this trial.

(emphasis added).

When the trial judge sequestered the jury, he emphasized precautions against external influences on their decision:

> Your freedom is going to be restricted somewhat.
>
> . . . .
>
> There will be an opportunity for you to speak to your family. However, that's going to be in the presence of one of the court bailiffs. It just has to be that way. And there won't be a television or telephone in your hotel rooms.

When jurors began their penalty phase deliberations, the trial court read to them the instructions for their sentencing determination. Again, the trial judge emphasized that the jury must base its verdict on the evidence in the case; must carefully follow the court's legal instructions; must not base its decision on passion, prejudice, or some other arbitrary response; but that it could consider mercy or sympathy for Harlan based on his allocution statements. In addition, the court instructed the jury that any verdict imposing the death penalty must be unanimous:

> During the course of the trial *you received all of the evidence you may properly consider* to decide the case.
>
> . . . .
>
> *Colorado law requires that you carefully follow the legal guidelines the Court will give you* in making your decisions about whether Robert Harlan will be sentenced to life in prison, without any possibility of parole or whether he will be sentenced to death.
>
> . . . .
>
> You are instructed that *you may consider mercy or sympathy for Robert Harlan arising out of the*

> *evidence and his statements in allocution* to you as mitigation in this case.
>
> However, *the law requires that your decisions not be the result of a passion, prejudice or other irrational or arbitrary emotional response against Robert Harlan.*
>
> . . . .
>
> *Before imposing a death sentence, you must be unanimously convinced beyond a reasonable doubt that death, rather than life, is the appropriate penalty* for the defendant.
>
> This consideration involves a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or the imposition of the death penalty.
>
> . . . .
>
> [Y]ou must still all make a further individual moral assessment of whether you've been convinced beyond a reasonable doubt that the death penalty instead of life in prison is the appropriate punishment. . . .
>
> . . . .
>
> [Y]ou *should attempt to arrive at a reasoned judgment as to whether you have been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factor or factors.*

(emphasis added).

Based on the trial court's findings of fact at the evidentiary hearing and evidence in the record, the following occurred. The jury deliberated on the penalty phase

late into Friday evening, but did not reach a unanimous verdict. Several jurors studied Bibles Friday night in their hotel rooms, looking for passages relating to capital punishment and a citizen's duty to obey the law, and took notes on the location of particular passages.

Juror Eaton-Ochoa took notes on two passages. The first was *Leviticus* 24:20-21:[3] "[f]racture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death." The second was *Romans* 13:1: "[l]et every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God."

Juror Eaton-Ochoa brought a Bible into the jury room Saturday morning when deliberations resumed. Other jurors testified that more than one juror brought in a Bible, and that one of the Bibles present contained a study index with which a reader could locate passages on particular subjects. Jurors Eaton-Ochoa and Trujillo also brought their notes on biblical passages into the jury room. Juror Eaton-Ochoa showed juror Cordova the Bible text from Leviticus commanding the death penalty for murder, as well as the Romans text. By noon that day, the jury returned a unanimous verdict imposing the death penalty on Harlan.

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[3] These quotations are taken from the record, in which counsel read from juror Yantis-Cummings's Bible, a New Scofield Study Version. This is the Bible that Eaton-Ochoa used on Friday night and from which she took her notes, and may have been one of the Bibles present in the jury room on Saturday.

Approximately three months after the jury's death penalty verdict, defense counsel's investigator, Raelee Knapp, contacted jurors to interview them about their jury service. She spoke with five jurors who consented to interviews.

Juror Trujillo, the first juror to whom Knapp spoke, mentioned the presence and use of one or more Bibles and notes in the jury room. The other four, Eaton-Ochoa, Nowakowski, Wright, and Salter, confirmed this occurrence in their interviews.

Harlan promptly filed his "Motion to Vacate the Death Sentence Due to Jurors' Use of the Bible During Penalty Phase Deliberations" (Bible Motion). When we were considering Harlan's direct appeal, he asked us to first grant a limited remand to the trial court so that it could decide the Bible Motion. We declined, leaving that matter for later trial court decision.

After an intervening C.A.R. 21 decision in which we reinstated Harlan's trial counsel for the sole purpose of pursuing the Bible Motion,[4] the trial court held an evidentiary hearing and determined that the death penalty verdict must be vacated and life imprisonment without parole imposed.

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[4] Harlan had filed a post-conviction motion requesting conflict free counsel to investigate any possible ineffective assistance of counsel claims related to the public defender's management of his trial. Harlan then waived any possible conflict related to his trial counsel arguing the Bible Motion, and we ruled that the public defender could proceed on his behalf. *People v. Harlan*, 54 P.3d 871 (Colo.2002).

II.

The evidence adduced at the trial court's hearing shows that: (1) one or more jurors brought a Bible, a Bible index, and hand-written notes containing the location of biblical passages into the jury room to share with another juror during deliberations in the penalty phase of defendant's trial; (2) these extraneous materials contained a passage commanding the death penalty for murderers and another instructing obedience to civil authorities; and (3) these passages were pointed out by at least one juror to another juror before the jury reached its unanimous verdict imposing the death sentence. The trial court concluded that there was a reasonable possiblity that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan. Therefore, the trial court found that Colorado's legal standards require reversal of the jury's death sentence verdict in this case.

Because competent evidence in the record supports the trial court's findings of fact and the court's legal conclusions are correct, under CRE 606(b) and applicable case law, we uphold the trial court's order vacating Harlan's death sentence and imposing a sentence of life imprisonment without the possibility of parole.

In light of the trial court's findings, and exercising our independent responsibility to review the death sentence under former section 16-11- 103(6)(b), we can no longer say that the death penalty verdict was not influenced by passion, prejudice, or some other arbitrary factor. *See Harlan*, 8 P.3d at 499-501.

We turn first to defendant's argument that we do not have jurisdiction to review the trial court's judgment vacating the death sentence. We then proceed with our CRE 606(b) inquiry into competent evidence of juror misconduct during deliberations.

A. Jurisdiction Under C.A.R. 21

Harlan contends that there is no statute authorizing the prosecution's appeal of the trial court's order vacating his death sentence. The prosecution cites two provisions for its asserted appeal right. (Section 18-1-410(3), C.R.S. (2004), provides that "an appeal of any order by the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed shall be to the Colorado supreme court." Section 13-4-102(1)(h), C.R.S. (2004), provides that the court of appeals does not have jurisdiction over appeals from the final judgments of district courts in "[c]ases appealed from the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed."

Both of these sections took effect "July 1, 1994, and shall apply to sentences imposed on or after said date." An Act Concerning Methods to Expedite Review of Death Penalty Cases, ch. 262, sec. 5, § 16-12-101.5, 1994 Colo. Sess. Laws 1473, 1475. The crimes for which the jury convicted Harlan took place in February 1994 and his sentence was imposed in September 1995. The prosecution argues that the statutes apply because Harlan's sentence was imposed after their effective date.

Harlan responds that his crimes occurred before the General Assembly's adoption of the added appeal provisions. At the time of his crimes, there was no appeal

provision for a postconviction order invalidating a death sentence. *See* § 16-11-103(7)(b), 8A C.R.S. (Cum.Supp.1994) ("If any death sentence imposed . . . is held invalid . . . [the] defendant shall be returned to the trial court and shall then be sentenced to life imprisonment."). Accordingly, argues Harlan, ex post facto constitutional principles prevent application of the later-enacted statute.

We need not resolve this dispute. In light of Harlan's contentions, there is a reasonable argument that the prosecution does not have an adequate alternative remedy. We agree with the prosecution that a trial court order vacating a jury-imposed death verdict is a matter of considerable public importance. Accordingly, we exercise original jurisdiction over this case under C.A.R. 21. *See Burchett v. South Denver Windustrial Co.*, 42 P.3d 19, 20 (Colo.2002) ("We exercise jurisdiction under C.A.R. 21 when a case 'raise[s] issues of significant public importance that we have not yet considered."') (internal citations omitted). We now turn to the rule of evidence that controls our analysis in this case.

B. CRE 606(b)

Colorado Rule of Evidence 606(b) strongly disfavors any juror testimony impeaching a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard. *See Hall v. Levine*, 104 P.3d 222, 225 (Colo.2005). This rule is designed to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. *See Stewart v. Rice*, 47 P.3d 316, 322 (Colo.2002).

Nonetheless, CRE 606(b) allows juror testimony on the question of whether extraneous prejudicial information was improperly brought to the jurors' attention:

> Upon an inquiry into the validity of a verdict or indictment, a juror *may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent* from the verdict or indictment *or concerning his mental processes* in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

CRE 606(b) (emphasis added).

Two applicable cases involving this exception are *Wiser v. People*, 732 P.2d 1139 (Colo.1987), and *People v. Wadle*, 97 P.3d 932 (Colo.2004). These cases establish a two-part inquiry: first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective "typical juror" standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant. Answering this inquiry presents a mixed question of law and fact. *Wadle*, 97 P.3d at 936-37. In these instances, we defer to the trial court's findings of historical fact if they are supported by competent evidence in the record, and we review the trial court's conclusions of law de novo. *People v. Matheny*, 46 P.3d 453, 461 (Colo.2002).

As to the first part of the inquiry, *Wiser* and *Wadle* instruct that any information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration. In *Wiser*, we held it improper for a juror to consult a dictionary for a definition of "burglary," the crime with which the defendant was charged. 732 P.2d at 1141. We found use of the dictionary improper despite the fact that the trial court in that case had not specifically admonished the jurors against the use of a dictionary. Rather, we cited with approval cases holding that jurors are required to consider only the evidence admitted at trial and the law as given in the trial court's instructions, and that they must accept the court's legal definitions and obtain any needed clarifications from the trial judge, not from outside sources. *Id.* at 1141. On this basis, we held that the dictionary was extraneous information and that its introduction and use to derive a definition not given by the trial judge was "improper" and amounted to "misconduct." *Id.* at 1141, 1143.

In *Wadle*, a juror searched the internet for a description of the anti-depressant drug Paxil and its medical uses and then shared the information with other jurors. This occurred after the jury had sent a note to the trial judge asking for a copy of the *Physician's Desk Reference* with which to look up the same information. The trial court refused the jurors' request, stating that reference materials of any kind are prohibited to jurors during their deliberations and referring them back to the instructions it had previously given. *Wadle*, 97 P.3d at 934. There was no dispute in *Wadle* that the Paxil information was improper and the information was extraneous. Although the trial judge in *Wadle* indirectly admonished the jurors not

to use outside reference materials during deliberations, we found that use of extraneous information may be improper "*whether or not* that exposure occurred as the result of *deliberate juror misconduct.*" *Id.* at 935 (emphasis added). In this regard, we followed the rule of *Wiser* that a juror's action in obtaining and using extraneous information during deliberations is improper, even in the absence of a specific instruction forbidding use of that particular extraneous information.

Thus, our cases are clear that extraneous information is improper for juror consideration whether or not the court specifically warned against its use. This rule holds in cases where the extraneous information contains legal content, as did the definition of "burglary" in *Wiser*, and where it contains factual information, as did the internet description of Paxil in *Wadle*.

Court inquiry into the improper introduction of extraneous information must comply with the narrow exception of CRE 606(b). Under CRE 606(b), the historical fact-finding of the trial court must focus on the circumstances surrounding the jury's exposure to outside information or influences and the nature of the information or influences to which it has been exposed. *Wadle*, 97 P.3d at 935-36. The court may not take into account testimony regarding the jury's deliberations, a juror's mental processes leading to his or her decision, or whether the extraneous information actually swayed any of the particular jurors' votes. *See, e.g., id.* at 938 (stating that the "[t]rial court clearly misunderstood the import of the objective test" when it "not only permitted inquiry into jurors' discussions and mental processes; it clearly relied on the substance of those discussions and mental impressions in

its determination that no prejudice resulted from the misconduct").

In *Wiser* and *Wadle*, we considered evidence from jurors regarding the source of the extraneous information, the manner of its acquisition, its content, and its presence and use in the jury room during deliberations. *See Wadle*, 97 P.3d at 937; *Wiser*, 732 P.2d at 1141. Evidence going to these facts is admissible under the CRE 606(b) exception for evidence regarding extraneous information improperly before the jury.

If the court's fact-finding, as guided by CRE 606(b), shows that jurors improperly considered extraneous information, a reversal of the verdict may be required if the defendant was prejudiced. *Wadle*, 97 P.3d at 935 (citing the "well-settled" proposition that exposure of a jury to information or influences outside of the trial process itself may require reversal of a criminal conviction even in the absence of deliberate misconduct); *see also Wiser*, 732 P.2d at 1141. In *Wiser*, we established the test for prejudice that comports with the limitations of CRE 606(b). We observed that CRE 606(b) precludes admission of the only evidence relevant to prove actual prejudice resulting from improper behavior by particular jurors; jurors cannot testify about the contents of their deliberations or their mental processes in reaching the verdict. *Wiser*, 732 P.2d at 1141.

Accordingly, we adopted an "objective test" for ascertaining "prejudice." The trial court must determine what influence the improperly introduced extraneous information might have had on a typical juror. This test recognizes that a reviewing court cannot consider evidence of actual impact on specific jurors in the case. The relevant question for determining prejudice is whether there is a reasonable

possibility that the extraneous information influenced the verdict to the detriment of the defendant; if so, the verdict must be reversed. *Id.* at 1142; *see also, Wadle*, 97 P.3d at 937 ("[t]he dispositive question posed by the objective standard is simply whether there was a reasonable possibility that a typical juror . . . would have been influenced by [the extraneous] information").

In *Wiser*, we held that there was no reasonable possibility that the defendant was prejudiced by the jurors' use of the dictionary. We reasoned as follows. A juror had consulted the dictionary definition of "burglary," which referred to "theft." From this definition, the juror could have easily but incorrectly concluded that theft is an element of burglary under Colorado law. Because the prosecution had not alleged or proved theft by the defendant, any influence the dictionary definition might have had on the jury would have been in the defendant's favor rather than to his detriment. *Id.* at 1143.

In contrast, in *Wadle* we upheld reversal of the defendant's conviction upon finding "at least a reasonable possibility that the extraneous information to which the jury was exposed influenced the verdict." 97 P.3d at 938. We reasoned that a typical juror could conclude from the extraneous Paxil information that the defendant was abnormally obsessive, compulsive, or given to panic. *Id.* at 937-38. The extraneous information was particularly material because evidence had been presented that the defendant took Paxil, and the prosecution alleged that the defendant had violently shaken her fussing four-month-old step-grandson, causing the injury that resulted in the infant's death.

Wiser and *Wadle* together considered several factors in determining whether improper introduction of the extraneous information into the jury room created a reasonable possibility that the jury's verdict was influenced to the detriment of the defendant. While these factors were not described as a formal test or an exhaustive list, we found them useful and persuasive in considering the issue of prejudice in those cases. Each of these factors is appropriate for inquiry under the CRE 606(b) exception: (1) how the extraneous information relates to critical issues in the case; (2) how authoritative is the source consulted; (3) whether a juror initiated the search for the extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous verdict; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant. *See Wadle*, 97 P.3d at 937; *Wiser*, 732 P.2d at 1143.

C. Application to this Case

We must first determine whether the trial court's findings of fact are supported by evidence admissible under the CRE 606(b) exception for jury testimony relating to extraneous information, as explained in *Wiser* and *Wadle*. We do not consider any findings that are unsupported by the record or based on inadmissible evidence. The record of the Bible Motion hearing contains much testimony by jurors about the content of their deliberations and whether or not the Bible passages actually affected the verdict. Rule 606(b) prevents us from considering this testimony. Instead, we must apply the *Wadle*

and *Wiser* "typical juror" legal standard, which focuses on the juror-introduced text and its possible prejudicial effect.

1. Trial Court's Findings of Fact – Extraneous Information Before the Jury

Evidence that jurors introduced and used Bibles, a Bible index, and hand-written notes on biblical passages in the jury room first surfaced during discussions with investigator Knapp in 1995. She spoke with five jurors who confirmed the consideration of such material before the jury reached its death verdict.

All twelve jurors testified at the Bible Motion hearing in 2003. As required by CRE 606(b), we limit ourselves to evidence and trial court findings that concern only whether extraneous prejudicial information was improperly brought to a juror's attention by another juror before the jury reached a verdict. *See Wadle*, 97 P.3d at 935-36. In addition, we may consider the nature of the extraneous information. *See id.*

The court found that several of the jurors researched the Bible for passages pertaining to the penalty for murder and shared them with other jurors:

> [s]everal jurors researched and reviewed [B]ibles on Friday evening, June 30, 1995, to locate biblical passages pertaining to the penalty for murder. Some of the jurors wrote down the biblical passages they located so that they could take them to the jury deliberation room to share with other jurors on Saturday morning, July 1, 1995, when the jury reconvened to continue their deliberations.

This finding considers facts that are permissible for inquiry under CRE 606(b), *Wadle*, and *Wiser* to show: (1) the source of the extraneous information; (2) that jurors initiated the search for the information; and (3) the content of the extraneous material.

The following testimony from juror Eaton-Ochoa at the Bible Motion hearing clearly shows that she studied from her Bible Friday night and wrote down information about the Leviticus and Romans passages:

> Q. I'm going to read to you from 13:1 Romans, this Bible [belonging to Yantis-Cummings], all right?
>
> . . . .
>
> "Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God." Does that sound more familiar to you?
>
> A. Yes.
>
> Q. Would that be one of the scriptures that you researched?
>
> A. Yes.
>
> . . . .
>
> Q. Now, when you were researching in your Bible index, were you taking notes?
>
> A. Yes.
>
> . . . .
>
> Q. Now, when you were researching, do you also specifically remember looking up a passage, "Eye for an eye, life for a life"?

A. Yes.

Q. And, "If you take a life, you shall be killed"?

A. Yes.

. . . .

Q. Now, I'm going to read to you from [Yantis-Cummings's] Bible. . . .

Your honor, Leviticus, Chapter 24:20.

"Fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him." Does that sound familiar as one of the passages that you looked up?

A. There were several scriptures in the Bible that were similar and that's similar to what I was referring to, yes.

Q. All right.

And then it goes on 24:21: "And whoever kills an animal shall restore it, but whoever kills a man shall be put to death." Does that also sound familiar as one of the passages you looked up[?]

A. That's close to it, yes.

Q. And again, you researched and took notes of the passages you looked up?

A. I didn't take notes, I wrote addresses, which would be scripture reference.

Jurors Nowakowski, Yantis-Cummings, and Trujillo also testified at the hearing that they read from Bibles Friday night. Jurors Yantis-Cummings and Trujillo testified that they took notes from their Bibles.

Thus, the court's finding that "jurors researched and reviewed [B]ibles on Friday evening" and "wrote down biblical passages" is supported by competent evidence in the record.

The trial court also found that Bibles and notes concerning biblical passages were taken into the jury room on Saturday morning during the death penalty deliberations and were discussed prior to the death penalty verdict:

> [j]urors took [B]ibles and notes with biblical passages concerning the penalty for murder into the jury deliberation room on Saturday morning, July 1, 1995. These materials were read and discussed among and between jurors prior to a verdict being reached.

The evidence supporting these findings is admissible under CRE 606(b) and the *Wiser* and *Wadle* standards to establish: (1) the presence of improperly introduced extraneous materials; (2) the content of the extraneous information; (3) whether the materials were used by jurors; and (4) whether they were used before the jury reached its verdict.

In making these findings, the trial court had to engage in difficult credibility determinations. The jurors' testimony was confused and contradictory. Jurors testifying in 2003 at the Bible Motion hearing had difficulty remembering events of 1995. Several who gave statements to investigator Knapp in 1995 contradicted those statements in 2003. Of course, we cannot second-guess determinations of the trial court regarding witness credibility. *See People v. Pitts*, 13 P.3d 1218, 1221 (Colo.2000) ("It is the function of the trial court, and not the reviewing court,

to weigh evidence and determine the credibility of the witnesses."); *Wilson v. Bd. of County Comm'rs*, 703 P.2d 1257, 1259 (Colo.1985) ("[I]t is not the province of this court to judge the weight of the evidence or the credibility of the witnesses.").

In the 1995 interviews, conducted three months after the trial, jurors Eaton-Ochoa, Nowakowski, Wright, Trujillo, and Salter mentioned that they saw, brought, or might have seen Bibles, a Bible index, or notes on biblical passages in the jury room during deliberations Saturday morning before the jury reached the death verdict. At the 2003 hearing, Wright and Salter denied or expressed doubt about these prior statements.

But juror Eaton-Ochoa stated in both 1995 and 2003 that she brought a Bible and notes of Bible passages into the jury room. Juror Nowakowski told investigator Knapp that she saw a Bible containing a study index in the room and did not contradict that statement at the hearing. Juror Eaton-Ochoa stated that she used a Bible to show the Leviticus and Romans passages to juror Cordova on Saturday morning in the jury room:

> Q. Do you remember telling Ms. Raelee Knapp . . . that one of the passages you specifically remember researching . . . [was] 'I will use you as a tool and if a man takes a man's life, then his life should be taken.'
>
> A. Okay, I don't think that that was one scripture, I think that was the two scriptures that we've already referenced [Leviticus] 24:20-21 and Romans 13:1], put together.
>
> . . . .

Q. When you resumed your deliberations the following morning, did you bring a Bible into the deliberation room with you?

Q. For what purpose?

A. To show Jesus [Cordova] the scriptures I had looked up.

A. Yes, I did.

. . . .

Q. Was Jesus – did you show that to Jesus before a decision was made?

A. Yes.

In addition to this evidence, juror Cordova stated there was no Bible present during deliberations and no discussion of biblical passages. However, he also stated, erroneously, that the trial court had told the jurors not to bring in Bibles or discuss verses. In addition, he testified that the jurors considered no evidentiary exhibits during their deliberations and that he did not have a roommate during sequestration at the hotel, all of which is contradicted by the record. The testimony of three witnesses impeached all or portions of juror Cordova's 2003 testimony.

Two other jurors, Smith and Taylor, denied the presence of Bibles or discussion of verses. Both stated that someone mentioned biblical information in the jury room Saturday morning, but Smith cut the person off because the discussion was inappropriate. No other juror corroborated this statement.

The trial court noted that some jurors "appeared defensive and at times resentful" about testifying at the

hearing, that "the significant lapse of time since the trial had taken a toll on their abilities to recall," and that some jurors granted interviews in 1995 and "[o]thers refused." The court found "[a]ll of these circumstances . . . of considerable importance and significantly weighty in assessing the credibility of the witnesses." The court properly made its determinations on credibility, *see Pitts*, 13 P.3d at 1221, and its finding is supported by competent evidence. Accordingly, we will not second-guess the court's credibility determinations.

Finally, the trial court found that the jurors were exposed in the jury room to passages relating a biblical command for imposition of the death penalty before the verdict was reached.

> *[j]urors were exposed to [B]ibles and [B]ible passages concerning God's view on punishment for murder while they were sequestered during their deliberations on the penalty phase of the Defendant's trial.* This occurred when they took the evening recess on Friday, June 30, 1995 and when they resumed their deliberation on Saturday, July 1, 1995. *The biblical passages were read and discussed in the jury room. This occurred prior to the jury reaching a unanimous verdict.* The credible evidence does not indicate that jurors were at a particular step in the four step process. *What is certain is that a verdict imposing the death sentence had not been reached at the time the extraneous materials were considered.*

(emphasis added).

This finding is also supported by evidence that is permissible under CRE 606(b), *Wiser*, and *Wadle* to show:

(1) the nature of the extraneous information considered; and (2) during which phase of deliberations it was presented.

Perhaps the most telling evidence of extraneous materials again came from juror Eaton-Ochoa. Her testimony was clear that she showed the Leviticus and Romans passages to juror Cordova Saturday morning before the jury reached its death penalty verdict.

Because they are supported by evidence in the record admissible under CRE 606(b), we defer to the trial court's findings of fact that jurors, without authorization from the trial court: (1) researched Bible verses and took notes on them on Friday night; (2) brought one or more Bibles, a Bible index, and notes on certain biblical passages into the jury room during sentence phase deliberations on Saturday morning; and (3) shared in the jury room an authoritative passage commanding the imposition of the death penalty for murder before they reached their verdict imposing the death penalty on Harlan.

We now turn to our legal conclusions based on this evidence and these findings.

2. Conclusions of Law

Our inquiry involves the same two-step process guiding the trial court: whether extraneous information was improperly before the jury and whether use of that information could have influenced the verdict to Harlan's detriment.

a. The Extraneous Information was Improperly Introduced into Consideration

The trial court properly found that one or more jurors introduced one or more Bibles, a Bible index, and notes of Bible passages into the jury room for consideration by other jurors. The trial court had not admitted these materials into evidence, nor did the court's instructions allow their use. Accordingly, these materials were extraneous and their introduction was improper and constituted misconduct.

CRE 606(b) and the standards of *Wiser* and *Wadle* do not require a trial court order prohibiting use of particular material before that material may be found to be extraneous and improperly before the jury. The information is improper and its introduction by one juror for consideration by another prior to the verdict constitutes juror misconduct as long as the trial court has delivered standard instructions limiting the jury's consideration to admitted evidence and the court's legal instructions. *See Wiser*, 732 P.2d at 1141. The court's instructions in this case were sufficient to admonish the jury that they could only consider the evidence and law presented during the trial.

Exposure of a jury to information or influences outside of the trial process itself may require reversal of a criminal conviction "whether or not that exposure occurred as the result of deliberate juror misconduct." *Wadle*, 97 P.3d at 935. Because the trial court's admonitions were thorough and sufficient to instruct a capital sentencing jury, and because the written biblical materials used in the jury room were neither admitted into evidence nor permitted by court instruction, their use in this case was improper.

b. Prejudice Inquiry

Turning now to the prejudice examination required by *Wiser* and *Wadle*, we conclude that there is a reasonable possibility that the Bible material introduced into the jury room would have influenced a typical juror to vote for the death penalty instead of a life sentence, to Harlan's obvious detriment.

Under the state's two-phase jury process in cases where the prosecution seeks the death penalty, the jury may be called upon to reach two verdicts. First, the jury determines whether the defendant is guilty beyond a reasonable doubt of first degree murder. This verdict must be unanimous. Second, employing the four-step process as instructed by the trial court, the jury determines whether to impose life imprisonment or death. *See People v. Dunlap*, 975 P.2d 723, 736 (Colo.1999). Colorado has tailored its four-step death penalty process to center on the proposition that any individual juror may ultimately trigger life imprisonment by not agreeing to a death penalty verdict.

The first three steps are: (1) the prosecution must prove beyond a reasonable doubt that at least one aggravating factor exists; (2) each juror must consider whether any mitigating factors exist; and (3) the jury must unanimously decide whether any mitigating evidence outweighs the aggravating factors. *See Woldt v. People*, 64 P.3d 256, 264 (Colo.2003); *Dunlap*, 975 P.2d at 736. Only if the jury finds that the mitigating evidence is outweighed by aggravating factors does it proceed to the fourth step. *Dunlap*, 975 P.2d at 736.

In order to impose the death penalty, during the fourth step the jury must find that it is convinced beyond a

reasonable doubt that death is the appropriate sentence, its verdict must be unanimous, and its imposition of the death penalty must not be influenced by passion, prejudice, or any other arbitrary factor. *See Harlan*, 8 P.3d at 499; *Dunlap*, 975 P.2d at 736; *see also Woldt*, 64 P.3d at 264 ("Colorado's fourth step requires the trier of fact to consider all *relevant* evidence.") (emphasis added). In reaching its ultimate verdict, the jury may consider all the evidence introduced at trial, as well as the defendant's statement in allocution. Any one juror, by holding out against a unanimous verdict of death, can require imposition of life imprisonment without parole. *See Woldt*, 64 P.3d at 264.

Both *Wiser* and *Wadle* address jury verdicts in the guilt phase of criminal trials. Of course, it is only the unusual criminal case in which the jury is called upon to reach a second verdict, such as in the unique circumstances in which a jury might impose the death penalty. The *Wiser* and *Wadle* precedent is especially appropriate in a capital case, where the extraneous information improperly introduced into consideration may influence a typical juror to vote for a death sentence instead of voting for life imprisonment without parole.

We now consider the same prejudice factors we considered in the *Wiser* and *Wadle* analyses.

First, we consider how the extraneous information related to critical issues in the case. Here, the written biblical material was directly related to the ultimate issue for jury determination, a sentence of life or death.

Second, we consider the degree of authority represented by the extraneous information. In *Wadle* we found that scientific information from the internet would be

considered authoritative by typical lay jurors. 97 P.3d at 937-38.

The Bible and other religious documents are considered codes of law by many in the contemporary communities from which Colorado jurors are drawn. The book of Leviticus is one of the first five books of the Old Testament, which are considered the books of law, and it contains "ritual laws prescribed for the priests" and is "almost entirely legislative in character." *Holy Bible* (Papal Edition), "Introduction to the Books of the Old Testament" at xiii. Romans is contained in the New Testament and may be characterized as "a powerful exposition of the doctrine of the supremacy of Christ and of faith in him as the source of salvation." *Id.*, "Introduction to the Books of the New Testament" at xxxix. There can be little doubt that the Bible, including these two texts, is more authoritative to many typical citizens than the internet. *See Jones v. Kemp*, 706 F.Supp. 1534, 1560 (N.D.Ga.1989) (considering jurors' consultation of a Bible and holding that "[e]specially when, as here, such arguments come from a source which 'would likely carry weight with laymen and influence their decision,' the effect may be highly prejudicial to the defendant") (internal citations omitted).

Third, we consider how the information was acquired. Without authorization from the trial court, one or more jurors independently researched the extraneous written biblical material for presentation to other jurors.

Fourth, we consider whether the information was shared with other jurors in the jury room. It was. Juror Eaton-Ochoa showed the passages to juror Cordova, and the discussion of the texts possibly included other jurors.

Fifth, we consider whether the information was considered before the jury reached its verdict. After hearing admissible testimony and making its credibility determinations, the trial court found that jurors considered the Leviticus and Romans passages before they reached their death penalty verdict. Reviewing the evidence, the court found that it could not determine at what step in the four-step deliberation process jurors considered the Bible texts. In any event, *Wiser* and *Wadle* require only that the improper, extraneous information is considered before the jury reaches its verdict and there is a reasonable possibility that it influenced the verdict to the detriment of the defendant.

Finally, we consider whether there is a reasonable possibility that the Leviticus and Romans passages would influence a typical juror to Harlan's detriment in this death penalty proceeding. The question here is not whether the jury's verdict actually turned upon consideration of the Bible texts, but whether a typical Colorado juror would be influenced to vote for the death penalty by biblical text introduced into the jury room without authorization.

The Leviticus text is written in the first person voice of God and commands death as the punishment for murder. The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty. If the jury was unable to reach a unanimous verdict of death, the trial court would have been required to impose a life sentence without the possibility of parole. Drawn from an array of typical jurors in Colorado, at least one juror in this case could have been influenced by these authoritative passages to vote for the death penalty when he or she may otherwise have voted for a life

sentence. All the indicia of prejudice considered by *Wiser* and *Wadle* for reversal of jury verdicts are more than met here.

In *Dunlap*, we cited with approval the United States Supreme Court's admonition that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Dunlap*, 975 P.2d at 763 (*quoting Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)). The *Caldwell* Court was referring to a prosecutor's argument that the jury need not be concerned about imposing the death sentence because it would be automatically appealed to the state supreme court.

How much more persuasive to a typical juror, then, is a biblical text relieving the juror from his or her individual responsibility to determine whether to commit a person to death because God commands that result? A religious text mandating the death penalty meets the *Wiser* and *Wadle* standard of extraneous information creating a reasonable possibility that a typical juror would be influenced in voting on the verdict.

In so holding, we do not suggest that the jurors who served in this case were unable to distinguish between religious and state law. Neither do we hold that consideration of the text actually produced the death penalty verdict. To the contrary, CRE 606(b) prevents us from considering any juror testimony that addresses the jury's deliberations or a juror's thought process. Our legal analysis here is far from an inquiry that emphasizes the form of the religious texts considered here over their

substance. Rather, our jurisprudence has developed the *Wiser* and *Wadle* objective typical juror test for ascertaining prejudice as a means to prevent invasion of the jury's deliberative process while protecting the defendant's right to a verdict untainted by extraneous prejudicial texts. We conclude that introduction of the Bible by a juror to demonstrate to another juror a command of death for murder created a reasonable possibility that a typical juror would have been influenced to vote for a death sentence instead of life; consequently, we must uphold the trial court's judgment vacating the death sentence and sentencing Harlan to life imprisonment without parole.[5]

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[5] Several courts in other jurisdictions have considered the possibility of prejudice arising from jury consideration of biblical information during deliberations. Some courts have found that prejudice did arise or would have arisen from the use of Bibles during deliberation. *See, e.g., Jones v. Kemp,* 706 F.Supp. 1534, 1560 (N.D.Ga.1989) (habeas corpus petition granted in part because trial court permitted jurors to bring Bibles into deliberations); *Grooms v. Commonwealth,* 756 S.W.2d 131, 145 (Ky.1988) (Stephens, C.J., concurring) (stating that majority should have included "existence and use of a Bible during the deliberations" during death penalty phase as additional grounds for reversal); *State v. Franklin,* No. 19041, 2002 WL 1000415, *12 (Ohio App.2002) (where Bible was not actually present in jury room but verses were cited, claim dismissed absent evidence that this "had any effect on the jury"); *Glossip v. State,* 29 P.3d 597, 605 (Okla.Crim.App.2001) (reversing on other grounds and noting that jury's use of Bible during deliberations "may have an improper influence upon the . . . verdict"); *State v. Harrington,* 627 S.W.2d 345, 350 (Tenn.1981) (where case reversed on other grounds, jury foreman reading from Bible to support argument for death penalty "of course [] was error which would have required a new sentencing hearing"); *Lenz v. Warden of the Sussex I State Prison,* 267 Va. 318, 593 S.E.2d 292, 300 (2004) (presumption of prejudice only applicable where petitioner shows "evidence that the jury consulted, read aloud or discussed . . . Bible passage[s]").

Other courts have found no possibility of prejudice requiring reversal under the particular facts of the case. *See, e.g., Burch v. Corcoran,* 273

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We do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult "reasoned judgment" and "moral decision" he or she is called upon to make in the fourth step of the penalty phase under Colorado law. We hold only that it was improper for a juror to bring the Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations; the texts had not been admitted into evidence or allowed pursuant to the trial court's instructions.

We expect jurors to bring their backgrounds and beliefs to bear on their deliberations but to give ultimate consideration only to the facts admitted and the law as instructed. The judicial system works very hard to emphasize the rarified,

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F.3d 577, 591 (4th Cir.2001) (upholding trial court's finding of fact that juror carrying Bible, reciting verses and reading from Bible during deliberations was probably not improper communication and, if so, there was "no reasonable possibility that the jury verdict was influenced"); *McNair v. State,* 706 So.2d 828, 838 (Ala.[Crim.]App.1997) (no prejudice where selections from Psalm 121 ("my help cometh from the Lord") and Luke ("[j]udge not and ye shall not be judged . . . forgive and ye shall be forgiven") were "intended to encourage, and had the effect of encouraging, the jurors to take their obligation seriously and decide the question . . . based only on the evidence presented"); *People v. Mincey,* 2 Cal.4th 408, 6 Cal.Rptr.2d 822, 827 P.2d 388, 425 (Cal.1992) (no prejudice where trial court discovered that jury read Bible after day's deliberations were over and admonished them from any further consideration of Bible); *Jones v. Francis,* 252 Ga. 60, 312 S.E.2d 300, 303 (Ga.1984) (no prejudice against defendant where Bible was not secreted into jury room and no "extraneous influence" came to bear on jurors); *Bieghler v. State,* 690 N.E.2d 188, 203 (Ind.1997) (no prejudice where juror evidence showed that Bible was not consulted as an extralegal source of authority during deliberations); *State v. Kleypas,* 272 Kan. 894, 40 P.3d 139, 205 (Kan.2001) (no recall of jury required where juror affidavit gave no evidence that biblical material played a "major role" in verdict).

solemn and sequestered nature of jury deliberations; jurors must deliberate in that atmosphere without the aid or distraction of extraneous texts that could prejudicially influence the verdict.

The written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not. Some jurors may view biblical texts like the Leviticus passage at issue here as a factual representation of God's will. The text may also be viewed as a legal instruction, issuing from God, requiring a particular and mandatory punishment for murder. Such a "fact" is not one presented in evidence in this case and such a "legal instruction" is not the law of the state or part of the court's instructions.

From 1861 until 1901, the law of Colorado did impose a mandatory death sentence for those who committed first degree murder. *See, e.g.*, Act of Nov. 5, 1861, div. IV, § 20, 1861 Colo. Terr. Sess. Laws 290, 292-93 ("The punishment of any person or persons of the crime of murder shall be death."). In 1901, reinstating capital punishment after a four-year period during which it was abolished, the General Assembly introduced jury discretion in choosing a life sentence or the death sentence when a defendant was convicted of first degree murder. Act of May 2, 1901, ch. 64, Sec. 2, § 1176, 1901 Colo. Sess. Laws 153, 154 ("if murder of the first degree, the jury shall in its verdict fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death").

In 1994, when Harlan killed Rhonda Maloney and shot Jaquie Creazzo, the law of Colorado provided that a jury must determine whether a defendant convicted of

first degree murder must be sentenced to life or death according to a very specific and discrete decision-making process, which was the process the jury was charged to use in this case. *See* § 16-11-103(2)(a),(b) 8A C.R.S. (Cum.Supp.1994) (providing for the four-step jury deliberation process outlined above); *Woldt*, 64 P.3d at 264. Not only does the law provide for jury discretion on this matter, but it allows for a single juror to cause the imposition of a life sentence if he or she does not agree that the death sentence is required. *See Dunlap*, 975 P.2d at 736.

In a community where "Holy Scripture" has factual and legal import for many citizens and the actual text introduced into the deliberations without authorization by the trial court plainly instructs mandatory imposition of the death penalty, contrary to state law, its use in the jury room prior to the penalty phase verdict was prejudicial to Harlan. Our analysis of the six factors for prejudice, in the context of a death penalty verdict, leads us to conclude that there is a reasonable possibility that the extraneous biblical texts influenced the verdict to Harlan's detriment. *See Wiser*, 732 P.2d at 1142.

D. Prosecution's Invited Error Argument

The prosecution contends that the defense opened the door to juror use of the Bible materials in the jury room. We reject this contention. First, *Wiser* and *Wadle* are clear that consideration of extraneous materials during deliberations is itself improper because they are not part of the trial process. Second, defense counsel's argument did not invite the jurors to research the Bible's position on capital punishment. Rather, defense counsel was making a legitimate plea for mercy. In closing, she analogized the

relationship between Harlan and his father to the story of Abraham and Isaac in the Old Testament.

Evidence had been presented that, during police investigation of the crime, Harlan's father found incriminating evidence against his son and turned it over to the police. Defense counsel suggested that, like Abraham, Harlan's father loved his son very much, yet chose to take an action that threatened his son's safety because it was the right thing to do. As God ultimately took mercy on Abraham, defense counsel argued that the jury should be merciful to Harlan and his father and let the son live. Defense counsel also made several references to Harlan's soul and to his habit of reading the Bible with his father.

Defense counsel did not exceed the bounds of a mitigation argument. Had the prosecution believed that any part of this argument opened the way to the jury's use of biblical texts in the jury room, it could have asked the trial court to allow their introduction and use. Surely, if this request had been made, the trial court would have limited the prosecution to, at most, a suitable responsive argument to the jury. *See Jones v. Francis*, 252 Ga. 60, 312 S.E.2d 300, 303 (1984) (in closing of penalty phase, defense counsel traced at length the changes in approach to punishment between the Old Testament and the New Testament, but it was still error to allow jurors to take Bible into jury room); *cf. Kemp*, 706 F.Supp. at 1560 (finding error where trial court agreed to jurors' request to take Bibles into jury room). Using biblical allusions in closing argument does not invite unauthorized introduction of Bible texts into the jury room.

E. Our Duty of Independent Review for Passion, Prejudice, or Other Arbitrary Factors

As discussed above, we uphold the trial court's judgment vacating Harlan's death sentence based on the precedent and standards of *Wiser* and *Wadle*. In addition, with the evidence presented at the Bible Motion hearing, we must revisit that part of our earlier opinion that found that the imposition of Harlan's death sentence was not influenced by passion, prejudice, or other arbitrary factors.

If we determine that a death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors, we must set it aside. § 16-11-103(7)(b), 8A C.R.S. (Cum.Supp.1994) ("If any death sentence imposed . . . is held invalid . . . [the] defendant shall be returned to the trial court and shall then be sentenced to life imprisonment."); *Dunlap*, 975 P.2d at 764.

In *Harlan*, we considered the possible influence of racial bias on the death sentence verdict and found no evidence of a sentence imposed under the influence of passion, prejudice, or other arbitrary factors in the form of racial animosity. 8 P.3d at 499-501. Based on the trial court's findings and competent evidence of jurors' use of the Bible during deliberations, we do not have confidence that the death penalty here was not influenced by extraneous information. *See id.* Contrary to our prior finding, we determine that Harlan's death sentence may have been imposed under the influence of passion, prejudice, or other arbitrary factors – the use of an unauthorized extraneous text requiring the death penalty for the crime of murder. This is an additional basis for our decision upholding the trial court's imposition of a sentence to life imprisonment without parole.

III.

Accordingly, we uphold the trial court's judgment vacating the death sentence and imposing upon Harlan a life sentence without the possibility of parole, and we discharge the rule.

Justice RICE dissents and Justice KOURLIS joins in the dissent.

Justice BENDER and Justice COATS do not participate.

RICE, J., dissenting.

In an opinion that elevates form over substance, the majority holds that because some members of the jury read from a Bible during the course of deliberations, the death verdict must be set aside. I respectfully disagree.

Since inquiry into the jury's deliberations is prohibited except to determine whether extraneous prejudicial information was improperly brought to the jurors' attention, CRE 606(b), we would ordinarily assess the impact of the extraneous information by considering its likely impact on a "typical" jury. *See, e.g., People v. Wadle*, 97 P.3d 932, 935 (Colo.2004). However, in this case, each of the twelve jurors testified not only about whether extraneous information was brought into the jury room, but also about what impact, if any, the presence of a Bible in the jury room had on those deliberations. As a result, there is no need to assess the impact of the biblical passages on a "typical" jury.[1] Rather, we know from the sworn testimony

[1] As recognized in *Wiser v. People*, the impact upon a typical juror is a legal fiction, a judicially-created artifice intended to provide a structured inquiry of typicality where CRE 606(b) would restrict

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of the jurors themselves that not even one of the jurors was influenced by these biblical passages to vote for the death penalty, and thus, the biblical passages were not prejudicial to Harlan. Even so, I also am certain that there is no reasonable possibility that a typical jury would be prejudiced by exposure to the biblical passages at issue here.

Accordingly, because I believe the passages read by the jurors, although extraneous, were not prejudicial to Harlan, and did not affect the verdict in this case, I would reverse the trial court and reinstate the death penalty.

I. Facts

As an initial matter, I take exception to the facts set forth by the majority. First, there was no juror misconduct in this case. Although the jurors were advised of many things which they could not do during the course of their

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analysis of prejudice to mere speculation. *See* 732 P.2d 1139, 1141-42 (Colo.1987) ("The problem with both the requirement that the defendant demonstrate actual prejudice and the rebuttable presumption of prejudice approach is the difficulty, once a verdict has been reached, in obtaining evidence of actual prejudice or evidence with which to rebut the presumption because of the longstanding rule proscribing evidence concerning the mental processes of jurors."). However, in this case, whether proper or not, the trial judge held a five-day hearing during which all twelve jurors testified about the deliberations. As a result, it makes no jurisprudential sense to utilize an artificial legal device in order to assess the prejudicial impact of the biblical passages upon the jury's verdict. Indeed, since we know from the record that the extraneous evidence was not actually prejudicial to Harlan, the majority's insistence on reversing Harlan's death sentence by finding a reasonable probability of prejudice with reference to a "typical" jury is unwarranted.

deliberations,[2] the jurors were never told to refrain from consulting the Bible or other religious material.[3] As such, the conduct of jurors in this case is completely unlike that of the jurors in either *Wadle* or *Wiser*.

Specifically, both *Wiser* and *Wadle* involved violations of explicit court orders. In *Wiser*, 732 P.2d at 1141, we held that a juror's resort to a dictionary for a further definition of burglary after having been instructed as to the legal meaning of the term was misconduct. Likewise, in *Wadle*, 97 P.3d at 934, during deliberations, the jury sent a note to the court, asking why a doctor would prescribe Paxil instead of a different anti-depressant, and requested a copy of the *Physician's Desk Reference*. The court responded that supplying reference materials of any kind to a jury was prohibited, and it referred the jury back to its instructions. *Wadle*, 97 P.3d at 934. Despite this, a juror obtained information from the internet about the drug in

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[2] The record reflects that the jurors were told not to discuss the case with anyone, not to watch anything about the case on television, not to read anything about the case in the newspapers, and not to read anything about the criminal justice system as a whole in the newspapers. In addition, the jurors were told to base their "decision only on the evidence that you get at trial, nothing else whatsoever."

[3] The absence of such an instruction is curious as the record is replete with biblical references. For example, during voir dire proceedings, defense counsel specifically asked juror Cordova about the concept of "an eye for an eye," thus provoking discussion about one of the very Bible passages to which the majority now takes exception. In addition, during trial, Harlan's father testified that "God never gave up on a living man, I won't either" and that "God gave life and only God can take it." During his closing argument, defense counsel repeatedly referenced the Bible, telling the story of Abraham and Isaac and making several references to Harlan's soul and to his habit of reading the Bible. Even Harlan himself mentioned talks with his father concerning "sports, family and the Bible" in his statement of allocution.

question and shared that information with the other jurors. *Id.* We held this behavior to be juror misconduct. *Id.* at 937.

Second, and contrary to the trial judge's findings,[4] this is not a case where the use of extraneous information was extensive or widespread. The trial court greatly overstated both the nature of the extraneous information and the jurors' use of that information, making conclusions from these overstated facts which are simply not supported by the record.

For example, the trial court concluded that juror Ochoa "read and wrote down the cite to *Romans* 13:1, which requires that one look at government authorities as God's representative on earth and follow their lead as agents of 'wrath to bring punishment to the wrongdoer."' The trial court's reference to the phrase 'wrath to bring punishment to the wrongdoer,' however, finds absolutely no support in the record. While it is correct that juror Ochoa referred to *Romans* 13:1, that passage merely states "Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God." The phrase the trial court cited actually comes from *Romans* 13:4, not *Romans* 13:1. *Romans* 13:4 was not brought out in sworn testimony

[4] We defer to the trial court's findings unless they are so clearly erroneous as to not find support in the record. *See, e.g., People v. Schrader,* 898 P.2d 33, 36 (Colo.1995). "A finding is clearly erroneous, and, therefore, lacking support of competent evidence, when 'although there [may be] evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."' *Quintana v. City of Westminster,* 56 P.3d 1193, 1196 (Colo.App.2002) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

or in any prior statements, so there was never any indication that any juror even looked at it, much less considered it.[5] The majority makes no attempt to correct these overstatements.

In addition, the trial court improperly made credibility findings against some of the jurors based on their refusal to talk to the defendant's investigator. The trial court found that the testimony of jurors Yantis-Cummings, Dockter, Elizalde, Smith, and Taylor, all of whom testified that they either did not recall seeing a Bible or were sure that they had not seen a Bible in the jury deliberation room, was not credible or persuasive because these jurors had refused to grant interviews to the defense investigator after the trial. This inference is absolutely improper.

Courts are required to instruct jurors upon their discharge that it is entirely the jurors' decision whether to talk to anyone about the case or their service as a juror. *See* CJI-Crim. 1:06. In addition, the very purpose of CRE 606(b) is to protect jurors from unwelcome and unnecessary contact by either party after the jurors have rendered a verdict. *Stewart v. Rice*, 47 P.3d 316, 322 (Colo.2002). As such, a juror's reluctance to talk to, much less grant an interview to an investigator employed by counsel cannot be used to discredit his or her subsequent sworn testimony.

In short, a thorough review of the record supports the following conclusions: 1) some jurors read personal or hotel Bibles during the recess from deliberations on Friday evening, focusing on *Romans* 13:1, as well as *Leviticus*

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[5] For another example, see *infra* note 9.

24:20-21 and other passages similar to "an eye for an eye";[6] 2) one juror brought a Bible into the jury deliberation room on Saturday; 3) that same juror showed another juror the written *Romans* 13:1 passage and passages similar to "an eye for an eye"; 4) there was very limited discussion of the *Romans* 13:1 passage and passages similar to "an eye for an eye" in the jury room; and 5) any biblical discussions that occurred took up a proportionally small amount of time during deliberations and were not for the purpose of convincing a member of the jury to vote for the death penalty.[7]

II. Legal Analysis

I now address whether the jurors were exposed to extraneous prejudicial information in the form of biblical passages. It is important to note that the concept of "extraneous information" does not include the general knowledge a juror brings to court. *See Destination Travel, Inc. v. McElhanon*, 799 P.2d 454, 456 (Colo.App.1990). To the contrary, we expect jurors in death penalty cases to rely not only on their life experiences, but also on their moral judgments. *See People v. Martinez*, 970 P.2d 469, 477 (Colo.1998) ("Quite simply, a capital sentencing hearing is qualitatively different from any other kind of sentencing proceeding: only in a capital case is the death penalty an issue.").

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[6] The majority does not hold that it is error for the jurors to read the Bible in the privacy of their hotel rooms, and I agree with that.

[7] Juror Eaton-Ochoa testified that she showed juror Cordova the Bible to show him that "[t]he Bible says obey the laws of the land."

Rather, "extraneous information" generally refers to facts about the case which were not admitted into evidence. *See McElhanon*, 799 P.2d at 456. In this case, jurors were exposed to two specific biblical passages in the jury room, *Romans* 13:1 and *Leviticus* 24:20-21. Since these written biblical passages were not admitted into evidence as facts, they are by definition "extraneous information."

Thus, contrary to what the majority states,[8] the only issue is whether the jury's exposure to this specific information was prejudicial to Harlan. For the reasons discussed below, I conclude that there is no reasonable possibility that exposure to written versions of *Romans* 13:1 and *Leviticus* 24:20-21 was prejudicial to Harlan.

A. The Biblical Passages Referenced Here Were Not Prejudicial to Harlan

The jurors' exposure to *Romans* 13:1 and *Leviticus* 24:20-21 was not prejudicial to Harlan because the jurors were required to make an overwhelming moral decision, namely whether the death penalty was an appropriate punishment for Harlan. To this end, the court instructed the jurors to "apply [their] *reasoned judgment* in deciding whether the situation calls for life imprisonment or the imposition of the death penalty" (emphasis added). The

[8] Based on its interpretation of *Wiser* and *Wadle*, the majority sets forth six factors to consider when analyzing the effect of extraneous information on a jury. Maj. op. at 626. However, neither *Wiser* nor *Wadle* support this kind of categorical approach when undertaking an analysis of extraneous information. Rather, the sole inquiry upon which each case focuses is whether there is a reasonable possibility that exposure to extraneous information prejudiced the defendant. *See Wadle*, 97 P.3d at 935; *Wiser*, 732 P.2d at 1142.

court further told the jurors that "you must still all make a further *individual moral assessment* of whether you have been convinced beyond a reasonable doubt that the death penalty, instead of life in prison, is the appropriate punishment for [Harlan] in this case" (emphasis added). As such, the jury instructions squarely directed the jurors to consider their moral and religious precepts, as well as their general knowledge, when making a reasoned judgment about whether or not to impose the death penalty.

The biblical passages at issue here constituted either a part of the jurors' moral and religious precepts or their general knowledge, and therefore were relevant to the jurors' court-sanctioned individual moral assessment. For example, *Romans* 13:1 states that "[e]veryone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God." Contrary to what the trial court states,[9] the plain meaning and well-accepted interpretation of this passage is that individuals are to obey the laws of their nation. *See* Matthew Henry, *Commentary on the Whole Bible* 2227 (Hendrickson Publishers 1991) (1721). Thus, in effect, this passage instructs individuals to follow the laws of Colorado. The laws of Colorado do not mandate the death penalty, but rather provide a four-step process that guides jurors in reaching a decision on sentencing in capital cases. *See* maj. op. at 630.

Here, it is undisputed that the trial court properly instructed the jury to follow this four-step process at the

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[9] The trial court held that *Romans* 13:1 "plainly instructs mandatory imposition of the death penalty contrary to state law."

close of the sentencing hearing. Likewise, the prosecution and defense counsel instructed the jurors to adhere to this four-step process. There is no reasonable possibility that the jurors' exposure to a biblical passage instructing them to follow Colorado law was prejudicial to Harlan.

Similarly, exposure to *Leviticus* 24:20-21, or similar passages, also was not prejudicial to Harlan. *Leviticus* 24:20-21 provides that "fracture for fracture, eye for eye, tooth for tooth. As he has injured the other, so he is to be injured. Whoever kills an animal must make restitution, but whoever kills a man must be put to death."

The concept of "an eye for an eye" is more than a biblical passage; it is a cultural precept in contemporary society that has origins predating the Bible. *See Code of Hammurabi* § 196 (Robert Francis Harper ed. & trans., Univ. of Chicago Press 2d. ed.1904) (about 1750 B.C.). Religious and non-religious individuals alike are familiar with the phrase and its meaning as part of their general knowledge. Moreover, not all religious individuals subscribe to the "eye for an eye" mentality, as evidenced by juror Cordova's testimony on voir dire. When asked whether he ascribed to the idea of an eye for an eye, juror Cordova replied, "No, I can't." Rather, juror Cordova stated that his philosophy, which had been shaped by his readings of the Bible, was "to be as fair as I can in everything that I do."

In sum, the jurors were entitled to rely on their own moral and religious precepts, as well as their general knowledge, in making their moral decision whether the death penalty was an appropriate punishment. The biblical passages the jurors discussed constituted either a part of the jurors' moral and religious precepts or their

general knowledge, and thus were relevant to their court-sanctioned individual moral assessment. Accordingly, and as the record clearly shows, the extraneous evidence did not actually prejudice the jury's verdict. In addition, it is equally certain that there is no reasonable possibility a typical jury would have been influenced. Therefore, Harlan was not prejudiced.

B. The Biblical Passages Referenced Here were Not Used As An Extra-Judicial Code.

The majority apparently agrees that these passages are not prejudicial, at least to the extent that the biblical passages are spoken or remembered. Recognizing that the Bible informs the "reasoned judgment" and "individual moral assessment" of many in communities from which Colorado jurors are drawn, the majority concedes that each individual juror may rely on, "and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult 'reasoned judgment' and 'moral decision"' jurors are called upon to make in imposing the death penalty. Maj. op. at 632.

Nevertheless, the majority concludes that this otherwise proper information, i.e., the discussion of generally known biblical passages, somehow becomes an extra-judicial code that supplants Colorado law when presented in written form, stating the "written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not." Maj. op. at 632.

However, by choosing to define the written version of these commonly known biblical passages as "a higher authority," the majority elevates form over substance.

Many people know large parts of the Bible by heart and can quote certain passages verbatim with persuasive alacrity, particularly when the ideas in those passages are as widespread and generally known as those referenced here. It is without doubt that a juror may relate passages of scripture from memory during deliberations, and that such recitation would not even be considered extraneous, much less prejudicial. It makes little sense, therefore, that the exact same passage in written form is somehow enshrined with an authority that the spoken or remembered passage lacks.

In so holding, the majority puts death penalty jurors in an impossible bind; jurors are instructed to make the ultimate decision about life or death based on their individual moral assessment – so long as their individual moral assessments are made from memory. This holding is demeaning to all jurors, but especially the jurors in this case, because it assumes that jurors cannot be trusted to think for themselves or follow the law in the face of written, but not spoken, religious passages.

My experience with jurors leads me to emphatically reject the majority's way of thinking. Jurors chosen to serve in death penalty cases are selected for their ability, stated under oath, to uphold the law, apply the law to the facts, and to make reasoned judgments based upon their respective backgrounds and beliefs. To presume that jurors who have a religious background cannot distinguish between the written biblical passages referenced here and the written jury instructions – a presumption that must be made in order to find prejudice in this case – is to underestimate their intelligence and to belittle their participation in our legal system.

Jurors and the juries on which they serve are an essential component of the American legal system. We entrust jurors with decisionmaking abilities in difficult legal matters for many reasons. Jurors temper the rigors of law with community standards, jurors legitimize the legal process through their participation in rendering verdicts, and jurors check the potential abuses that might result from having one person decide the fate of another. James J. Gobert & Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* § 1.01 (2d ed.1990).

Though the jury system is not without flaws, it is an intrinsic element in the constitutional protections afforded by both our state and federal governments. Yet the majority opinion exhibits a complete lack of faith in the jury system and in the jurors who uphold that system, second guessing those jurors' abilities to follow the law in spite of and because of their religious backgrounds.

Because I believe that jurors have the intelligence and understanding to follow the law, both in spite of and because of their various backgrounds and beliefs, and because the passages read in this case, though extraneous, were not prejudicial, I would reverse the trial court's decision to vacate Harlan's death sentence, and reinstate the jury's verdict.

I am authorized to say that JUSTICE KOURLIS joins in this dissent.

☐ District Court Court Address: 17th Judicial District Adams County Justice Center 1100 Judicial Center Drive Brighton, CO 80601	
THE PEOPLE OF THE STATE OF COLORADO vs ROBERT ELLIOT HARLAN Defendant	▫**COURT USE ONLY**▫
Attorney or Party Without Attorney (Name and Address): Kathleen A. Lord Deputy State Public Defender 110 16th Street, Suite 800 Denver, CO 80202 Phone Number: (303) 620-4888 E-Mail: FAX Number: Atty. Reg.#: 14190	Case Number: 94 CR 187 Division E Courtroom 401
ORDER	

PROCEDURAL POSTURE

This is before the Court for the entry of an Order resolving Defendant's Motion To Vacate Death Sentence Due To Juror's Use Of The Bible During Penalty Phase Deliberations [244] and Defendant's Crim. P. 35 (a) Motion To Correct Sentence. The evidentiary hearing on the motions commenced on April 14, 2003 and was concluded on April 18, 2003. Written closing argument and memorandum briefs

setting forth the positions of the parties were subsequently filed.

Jury verdicts convicting the Defendant of the substantive charges were returned on June 20, 1995 and, later that day, the penalty phase of the trial began. Three days into the penalty phase, the trial court ordered the jury sequestered over concerns that the jury might be exposed to prejudicial media accounts about the case. The trial court staff supervising the jury engaged in efforts to prevent sequestered jurors from being exposed to television and print media information about the case. Bibles in hotel rooms, however were not removed and jurors had unrestricted access to them.

At the conclusion of the evidence in the death penalty phase of the trial, the trial court gave the jury several Instructions of Law, which were to be the controlling framework for the jury's death penalty phase deliberations. Instruction No. 1 informed the jury that they were required to "follow all of the rules as [the court] explained them to you. Even if you disagree with some of the rules, you must follow them . . . " Another instruction informed the jury that "Colorado law requires that you carefully follow the legal guidelines the court will give you in making your decisions . . . " (Instruction No. 5).

Instruction No. 6 pertained to the first step of the four-step process in which the jury had to consider whether the prosecution had proved beyond a reasonable doubt the existence of any aggravating factors. Other Instructions set out the second step of the process, where the jury was to determine the existence of any mitigating factors. (Instructions No. 12 and 16). The third step of the process, where jurors were to weigh the aggravating

factors against the mitigating factors, was explained in Instructions Nos. 17A and 20.

The fourth step of the process was explained in Instruction No. 18, which informed the jury that,

> "You[r] decision as to the appropriate penalty in this case should be based upon the considerations you have previously made during the first three steps of your deliberations as outlined in these instructions. Before imposing a death sentence, you must be unanimously convinced, beyond a reasonable doubt, that death, rather than life, is the appropriate penalty for the defendant. This consideration involves a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or the imposition of the death penalty . . . "

Instruction No. 14 informed the jury that they could "consider mercy or sympathy" for the Defendant and told them that "[t]he law requires that your decisions not be the result of passion, prejudice, or any other irrational or arbitrary emotional response . . . " Instruction No. 26 told the jury that they should not be "influenced by prejudice or bias" against the Defendant or by "sympathy or sentiment" for the victims. Finally, Instruction No. 19 informed the jury that "[e]ven if you unanimously decide that you have each been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the proven aggravating factor or factors, you must still all make a further individual moral assessment of whether you have been convinced . . . that the death penalty . . . is the appropriate penalty . . . "

The penalty phase deliberations began on Friday, June 30, 1995. No verdict was reached that day, an evening

recess was declared and the jurors were returned to their hotel rooms for the night. The jury deliberations resumed on Saturday morning, July 1, 1995 and a verdict imposing the death sentence was reached later that day

Interviews of jurors were conducted by Rae Lee Knapp, an investigator for the Public Defender, in September, October and November of 1995. Alleging that several jurors who sentenced him to death improperly researched and read from the bible during their sequestration and penalty phase deliberations, the Defendant filed the Motion To Vacate Death Sentence Due To Juror's Use Of The Bible During Penalty Phase Deliberations [244] ("Bible Motion") on October 25, 1995 and the Crim. P. 35 (a) Motion To Correct Sentence on August 20, 2001.

ISSUES PRESENTED

Relying on *Wiser* v. *People,* 732 P.2d 1139 (Colo. 1987), the Defendant's principal argument in support of his position that his death sentence should be vacated is that certain jurors impermissibly researched, read and discussed biblical passages or verses during their sequestered deliberations, and that this exposure to extraneous information or outside influences may have influenced their decisions to impose the death sentence.

The Prosecution requests that the Court first determine whether the issues raised by the Defendant are legally before the Court pursuant to the "Bible Motion" filed in 1995 or the Crim. P.35 (a) motion filed in 2001. The Prosecution takes the position that the Court only has jurisdiction to consider the Crim. P. 35 (a) motion and not the "Bible Motion".

Next, the Prosecution presents several arguments in opposition to the relief sought by the Defendant. The Prosecution first argues than no juror misconduct occurred. Alternatively, the Prosecution argues that if bibles were consulted by certain jurors, the death verdict could not have been influenced by their actions because bibles, and or, passages were read only for "comfort and inspiration", the biblical passages involved are commonly known and therefore, any reference to them was "benign" and the reference to biblical passages consumed only a minimal amount of time. The Prosecution further contends that, if jurors consulted biblical passages to assist them in deciding the appropriate penalty, this conduct was not improper because it occurred during the fourth step of the deliberative process, when jurors are called upon to perform a "profoundly moral evaluation.

The Prosecution also argues that the Defendant is not entitled to any relief because any error that occurred as a result of alleged juror misconduct was invited, when his counsel made biblical and religious references during the trial. Finally, the Prosecution contends that no relief is warranted because the evidence of guilt and the evidence in support of the death penalty was overwhelming and any juror misconduct which occurred was harmless error.

THE RELIEF REQUESTED IS PROPERLY BEFORE THE COURT PURSUANT TO BOTH THE "BIBLE MOTION" AND THE CRIM. P. 35 (a) MOTION TO CORRECT SENTENCE.

The jury sentenced the Defendant to death on July 1, 1995 and the trial court conducted a sentencing hearing on September 5, 1995 to impose sentences for the other guilty verdicts the jury returned. The record indicates that the

trial court forwarded a "Judgment and Warrant of Conviction" to the Colorado Supreme Court on September 7, 1995. Pending mistrial motions were heard on September 15 and 29, 1995. These motions were denied by the trial court and judgment of conviction was entered against the defendant on October 18, 1995. The "Bible Motion" was filed on October 25, 1995. Although the Prosecution objected to the setting of a hearing on the "Bible Motion" on jurisdictional grounds, the trial court, on November 8, 1995, scheduled the hearing for February 2, 1996. The Defendant objected to setting the hearing beyond December 2, 1995, the date by which the Notice of Appeal was due. On November 16, 1995, the Defendant filed a motion to extend the Notice of Appeal deadline in the Colorado Court of Appeals. The Prosecution filed an objection and the Court of Appeals, on November 20, 1995, denied the motion, but indicated instead, that it would grant a limited remand for a hearing on the "Bible Motion". The Notice of Appeal was filed in the Court of Appeals on December 1, 1995 and on December 1, 1995, the appeal was transferred to the Colorado Supreme Court. On December 8, 1995, the trial court vacated the February 2, 1996 hearing scheduled on the "Bible Motion" because it determined that it lacked jurisdiction to conduct the hearing. On August 15, 1996, the Defendant filed a Motion for Limited Remand in the Colorado Supreme Court so that a hearing on the "Bible Motion" could be conducted. The Prosecution objected and on August 20, 1996, the Motion for Limited Remand was denied. No hearing on the "Bible Motion" was ever conducted.

The Prosecution and the Defendant both agree that the substantive issues raised by the "Bible Motion" and the Crim. P. 35 (a) Motion To Correct Sentence are the same.

The relief requested by the Defendant is also the same. However, relying on *People* v. *Campbell,* 738 P.2d 1179 (Colo. 1987), the Prosecution, takes the position that this Court does not have jurisdiction to consider the "Bible Motion". The Prosecution contends that the trial court lost jurisdiction over the Defendant when, in a written order entered October 18, 1995, the trial court denied the Defendant's then pending motions and entered judgment of conviction. According to the Prosecution, once the Defendant was sentenced, there was no jurisdiction to address pending issues, even though the Notice of Appeal had not yet been filed. The Prosecution maintains that the Court should treat the "Bible Motion" "as if it had never been filed and as if the issues within it had never been raised." This Court disagrees.

The substantive issues are properly before the Court pursuant to each motion. The Crim. Pro. 35 (a) Motion To Correct Sentence is ripe because the Defendant's direct appeal has been resolved and it raises post-conviction matters which this Court has jurisdiction to address. The "Bible Motion" was timely even though it was filed after judgment of conviction entered because it was filed before the time for filing the Notice of Appeal had expired. Defense interviews of certain jurors had taken place and the Defendant was in possession of information that would have enabled him to legitimately file the "Bible Motion" prior to the date it was actually filed. However, the defense had not completed all of the interviews it wanted to conduct. Under these circumstances, it cannot be said that the decision to wait to file the motion until the investigation had been completed was unreasonable.

The holding in *People* v. *Campbell, supra,* is not as expansive as the Prosecution suggests. In fact, the Colorado Supreme Court said as much when it framed the issue it was considering: "The issue presented is narrow: Once a defendant's motion for new trial has been denied and sentence imposed, does the sentencing court retain jurisdiction to enter rulings on subsequent motions? We hold that it does not" *Campbell, supra* at 1180. To adopt the Prosecution's position and hold that the filing of the "Bible Motion" was a nullity would, as the Defendant persuasively argues, create quite an anomaly: No court would have jurisdiction over a defendant's case between the time of sentencing and the filing of the Notice of Appeal. That is not a practical result and the reality is that trial courts frequently and routinely address motions filed subsequent to sentencing and prior to the filing of the Notice of Appeal. This Court has jurisdiction to consider the issues presented in the two motions.

EXTRANEOUS INFORMATION OR OUTSIDE INFLUENCE

The Colorado Supreme Court, in *Wiser* v. *People,* 732 P.2d 1139 (Colo. 1987), adopted an objective test to determine whether a jury's exposure to extraneous information or outside influences requires that a verdict must be set aside. The *Wiser* court reviewed the requirements of CRE 606 (b), which limits inquiry into jury deliberations. CRE 606 (b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as

> influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The *Wiser* court then stated, "[w]e believe that the objective test of whether there is a reasonable possibility that extraneous information or influence affected the verdict should be used to determine if a new trial is required . . . " *Wiser* v. *People, supra,* 732 P.2d at 1142.

At the commencement of the hearing on the Defendant's motions, this Court adopted the Prosecution's position and made an evidentiary ruling that, pursuant to CRE 606 (b), only limited inquiry about what occurred in the jury deliberation room could be made of jurors called to testify. Jurors in the Defendant's trial who were called as witnesses could be asked only if there was a bible in the jury deliberation room and if so, when it was brought in, what biblical passages, if any, were read or discussed and at what point during the four-step penalty phase process this occurred. The Court also made evidentiary rulings during the hearing which allowed certain evidence to come in for a limited purpose, even though such evidence would otherwise be excludable under CRE 606 (b).

Several witnesses, including the twelve jurors who returned the death verdict testified at the hearing. Differing versions about what transpired during their deliberations

were presented by the jurors. In order to apply the *Wiser* test to address the substantive issues set forth in the Defendant's motions, this Court must first make credibility of witness determinations and resolve the factual disputes in the evidence presented at the hearing.

A) Did jurors read, research or review bibles and take notes from bibles in their hotel rooms during the Friday evening recess?

The jury began its death penalty deliberations on Friday, June 30, 1995. A verdict was not reached that day and an evening recess was declared. The sequestered jury was returned to their hotel rooms for the evening break. Some jurors indicated that they had access to bibles in the hotel rooms and read and researched certain biblical passages. Other jurors aren't so certain, can't remember or deny this claim.

Juror Lana Eaton-Ochoa

Ms. Lana Eaton-Ochoa shared a hotel room with Ridawn Yantis Cummings during the period of time that the jury was sequestered in the penalty phase of the Defendant's trial. Ms. Eaton-Ochoa and the other jurors went back to their hotel rooms at the end of the first day of deliberations, June 30, 1995. Ms. Eaton-Ochoa testified that, while in her hotel room, during the Friday evening recess, she saw Ms. Yantis-Cummings reading her bible. Ms. Eaton-Ochoa said she can't remember this now, as her memory about the events has faded, but she told Ms. Knapp in the 1995 interview that Ms. Yantis Cummings had brought a bible with her, that Ms. Eaton-Ochoa was researching the bible on Friday evening and used a bible

index while doing the research. Ms. Eaton-Ochoa also told Ms. Knapp during that interview that both she and Ms. Yantis Cummings were writing down biblical passages or verses as they read and researched the bible.

Ms. Eaton-Ochoa testified that she reads the bible for comfort, wisdom and inspiration and considers it to be her "moral compass". She testified that she borrowed Ms. Yantis Cummings' personal bible and was reading it that evening for reference, because "there was a gentleman (juror Jesus Cordova) who couldn't make a decision because he said that his faith was standing in the way and I knew that there was scripture in the bible that let us – that we are to obey the government, we are to obey the laws of the land and as a Christian you are to obey and this is what the law says, so this is what you should – so I was looking that up." (sic). Ms. Eaton-Ochoa testified that she did this for the benefit of "[the] juror who believed that the law by his faith, he was not wanting to give that vote because he was told what the result would be." (sic).

Ms. Eaton-Ochoa testified that she used Ms. Yantis Cummings bible to "clarif[y] the thoughts I was having" and that as she researched the bible using the bible index, she was taking notes. Romans 13:1 ("let every soul be subject to the governing authorities for there is no authority except from God" and "the authorities that exist are appointed by God") was similar to one of the scriptures Ms. Eaton-Ochoa looked up and wrote down on Friday evening.

There were other scriptures that Ms. Eaton-Ochoa researched that evening. She testified that she also researched and wrote down a scripture similar to Leviticus 24:20 ("fracture for fracture, eye for eye, tooth for tooth as

he has caused disfigurement of a man, so shall it be done to him") and Leviticus 24:21 ("and whoever kills an animal shall restore it, but whoever kills a man shall be put to death"). Ms. Eaton-Ochoa told Ms. Knapp in the 1995 interview that she remembered looking up a biblical passage that said, "I will use you as a tool, and if a man takes a life, then his life should be taken."

Juror Marietta Nowakowski

Ms Marietta Nowakowski testified that no verdict had been reached when the jury took the Friday evening recess. She went back to her hotel room, took the bible that was in her room and read it "to see what the bible says about death." In a March 13, 2003 interview with the Prosecution, she indicated that she looked up biblical references to see what God had to say about death. She testified that she reads the bible for comfort and inspiration.

Juror Steven Wright

Mr. Steven Wright was also interviewed by Ms. Knapp in 1995. During the hearing, he had difficulty recalling precisely what transpired during the penalty phase of the trial and recalled some of what he told Ms. Knapp during his interview in 1995. During the interview, he told Ms. Knapp that some jurors had read the bible during the Friday recess and "they had looked it up and it says throughout the bible, I guess, there was like ten different spots, you know, 'if you kill you shall be put to death' and it was two no's and one maybe or maybe three no's and one maybe. And those people were turned around."

Juror Ann Trujillo

Ms. Ann Trujillo testified that she reviewed a bible that was in her hotel room on Friday evening. She testified that she was trying to look up specific passages related to the punishment for murder. In a 1995 interview, she told Ms. Knapp that one of the passages she remembered reading provided that, if two or more people witness a murder, that person (the murderer) should be put to death. Ms. Trujillo testified that she may have written down on a piece of paper at least one of the biblical passages she had read.

Juror Lorrie Salter

In her testimony, Ms. Louie Salter was able to recall few details about her jury service. She attributes this to the fact that eight years have lapsed and her memory has faded. She did remember being interviewed by Ms. Knapp in 1995 and acknowledged that her memory back than [sic] was much clearer. In that interview, she said that one of the jurors had stayed up most of the night going through biblical passages. She also told Ms. Knapp that, "it was, I guess, the lifers that really held onto that and researched that." During her testimony, she complained about the contact Ms. Knapp initiated with her in 1995. Ms. Salter testified that she spoke to Ms. Knapp because she felt "hounded" and that she told Ms. Knapp certain things just to get rid of her and because she was stressed. However, Ms. Salter acknowledged that the first and only time Ms. Knapp spoke to her, she agreed to give a taped interview. The taped interview does not reveal that Ms. Knapp was in any way overbearing. Ms. Knapp used a conversational tone of voice and Ms. Salter's tone of voice

and her responses to questions do not reveal that Ms. Salter was in any way stressed to the degree claimed.

Juror Ridawn Yantis Cummings

Ms Ridawn Yantis Cummings shared a hotel room with Ms. Eaton-Ochoa during the time the jury was sequestered. She testified that during the penalty phase, her parents brought her personal bible to her hotel room. Ms. Yantis Cummings testified that during the Friday evening recess, following the first day of deliberations, she read her bible and took notes as she read passages. Her bible has an index or a study reference. Ms. Yantis Cummings was interviewed by the Prosecution in March, 2003 and at that time said that she had gone through the bible, had a sheet of paper with her for notes and looked up biblical passages regarding "what to do and obeying the government and things like that in this case." In that interview, she described her notes as being a reference sheet and shared it with her roommate, Ms. Eaton-Ochoa. Ms. Yantis Cummings declined to be interviewed by Ms. Knapp in 1995. In an interview with the Public Defender in April, 2003, Ms. Yantis Cummings testified that she was researching the bible, "regarding the whole jury process, in toto, because of the fact that it was pretty emotionally trying." She also stated that perhaps one of the pages of her notes related to following the government's laws.

Juror Jason Dockter

Mr. Jason Dockter shared a hotel room with Jesus Cordova during the time the jury was sequestered. Mr. Dockter testified that he didn't recall a bible in the hotel room and indicated that he believes that neither he nor his

roommate read a bible during the Friday evening recess. Mr. Dockter was contacted by Ms. Knapp in 1995 and refused to be interviewed. He did tell Ms. Knapp that he felt strongly about his decision in the case and didn't want it overturned.

Juror Jesus Cordova

Mr. Jesus Cordova denied that he shared a hotel room with anyone else during the time the jury was sequestered. He testified that he did not consult a bible during the Friday evening recess and that his hotel room did not have a bible. Mr. Cordova was interviewed in 2003 by Robin Folland, an investigator for the defense, and told her that he could not recall specific details about his jury service because he has had several surgeries, high blood pressure and diabetes since 1995. Mr. Cordova had difficulty remembering who interviewed him, whether it was in 1995 or 2003 or what, besides questions about bibles, was asked.

Juror Braulio Elizalde

Mr. Braulio Elizalde testified that he did not read a bible in his hotel room during the Friday evening recess. He also indicated that he did not see his roommate with a bible at anytime. He acknowledged that his memory about his jury service was better in 1995 and that his memory today is faded. He declined to be interviewed in 1995 by Ms. Knapp.

Juror Barbara Smith

Ms. Barbara Smith shared a hotel room with Hazel Taylor during the time the jury was sequestered. She testified that she did not see a bible in her hotel room and did not see Ms. Taylor with a bible at any time. She testified that Jesus Cordova had mentioned that he had been reading the Bible during the Friday evening recess. Ms. Smith declined to be interviewed by Ms. Knapp in 1995.

Juror Hazel Taylor

Ms. Hazel Taylor's roommate during her sequestration was Barbara Smith. Ms. Taylor testified that she did not see a bible in her hotel room at any time.

B) Did jurors take a bible and a bible index or notes with biblical passages into the jury deliberation room?

The jury returned to the jury deliberation room on Saturday morning, July 1, 1995, to continue their death penalty phase deliberations. A verdict imposing the death penalty was returned later that day. Some jurors have indicated that a bible or bibles, a bible index and notes were in the jury deliberation room and that biblical passages were read and discussed. Other jurors have said otherwise.

Juror Lana Eaton-Ochoa

Ms. Eaton-Ochoa testified that on Saturday moaning, July 1, 1995, she took a bible into the jury deliberation room to show juror Jesus Cordova the biblical scriptures

she had looked up the night before. She testified that a bible index was also in the jury deliberation room and that biblical passages were shown to juror Jesus Cordova because "he was reluctant to obey the laws of the land and come back with a death sentence."

Juror Marietta Nowakowski

Ms. Nowakowski testified that one of the jurors brought a bible into the jury deliberation room on Saturday when jury deliberations resumed. She described it as a "study bible" with an index where one could look up a word and find a passage. She testified that she remembers that the bible was opened up and that passages were read from the bible. She told Ms. Knapp in the 1995 interview that jurors used the bible in the jury deliberation room and that, although there were a few jurors who were initially in favor of a life sentence for the Defendant, a unanimous verdict was reached once the bible was used. Ms. Nowakowski indicated that some of the jurors were interested in looking up passages in the bible concerning what God felt the government's position was when it came to judging people who murder other people. Although she could not recall the specific passages that were read in the jury deliberation room, she testified that the passages "had to do with the right of judgment by the government in murder situations."

Juror Steven Wright

Mr. Wright did not remember whether a bible was in the jury deliberation room. He did, however, tell Ms. Knapp during the 1995 interview that he thought that some jurors had some notes in the jury room and that once

it was pointed out to certain jurors what the bible said they were able to reach a verdict.

Juror Ann Trujillo

Ms. Trujillo testified that she may have brought whatever notes she had prepared the night before while reading the bible into the jury deliberation room on Saturday morning when deliberations resumed. She indicated that several jurors had also brought notes from bibles they had reviewed the previous night. In a March, 2003 interview with the Prosecution, she indicated that she was not "familiar with [biblical] passages and where to go, so I know someone in the jury was familiar with the passages and where to go and where . . . it said an eye for an eye." She testified that she does not now remember if there was a bible in the jury room. However, in the March, 2003 interview with the Prosecution, Ms Trujillo indicated that a bible may have been on the table in the jury deliberation room and when the Prosecution asked her during the interview if she had read from it or if anyone had opened it and read it to the group, she replied, "I believe we did. I think some of us took notes as well and read what our notes had said." She testified that she remembers that the jurors had a discussion about their notes, that they read their notes and that their notes contained biblical passages, including "an eye for an eye".

Juror Lorrie Salter

Ms. Salter was unable to recall in her testimony whether there was a bible in the jury deliberation room on either Friday or Saturday. She attributes this to the

passage of time and a fading memory. She does remember some reference to "an eye for an eye and a tooth for a tooth" and "you take someone's life, your life is over." She recalled being interviewed by Ms. Knapp in 1995. She told Ms. Knapp that "the ones that had the bibles were the weaker of the bunch – emotional wise, strength." (sic). She stated in the interview that there were several people in the jury deliberation room who were very religious and they were the ones who had taken the bibles into the deliberation room. According to Ms. Salter two or three jurors brought bibles on Saturday. She also indicated that Jesus (Cordova) had taken a bible index into the jury room. Ms. Salter also said in that interview that she remembered biblical passages being looked up in the jury deliberation room: "Specifically, there was two. One I can't remember the passage but we had – they had read it where an eye for an eye, tooth for a tooth. The one that if you kill somebody that your – automatically your life is given up because you've taken another." (sic). At another point in the interview, Ms. Salter stated, "One individual stayed up most of the night and went through the passages of the bible to help. The ones that came up the most were the ones where in the Bible if you had taken one of God's creatures, or man, that you're automatically – the sentence for that is death. There was no: You're going to be in life for prison, or whatever it was, automatically for death." (sic).

Juror Roxie McCullough

Ms. McCullough testified that because eight years have lapsed since her jury service, she is unable to state whether bibles were in the jury deliberation room. She does remember reference to the biblical passage, "if a

person takes a life, their life must be taken" but doesn't remember if this was read or whether it came out during deliberations on Friday or Saturday. Ms. McCullough declined to be interviewed by Ms. Knapp in 1995. She did grant an interview to the Prosecution in March, 2003. During that interview, she indicated that the biblical passage may have been read off of a piece of paper. Ms. McCullough was also interviewed by Rick Salinger, a Channel 4 reporter in 2001. She told Mr. Salinger that biblical passages were read in the jury deliberation room and that jurors brought bibles into the deliberation room.

Juror Ridawn Yantis Cummings

Ms. Yantis Cummings was able to recall little about the notes she took while reading and researching the bible during the Friday recess. She refused to be interviewed in 1995. She did acknowledge in interviews in 2003 that she prepared a reference sheet with biblical passages and shared it with her roommate, Lana Eaton-Ochoa. She indicated that she could not say whether or not she took the reference sheet with her into the jury deliberation room.

Juror Jason Dockter

Mr. Dockter testified that he has no recollection of a bible ever being in the jury deliberation room. He also indicated that he does not recall biblical passages being discussed at any time during deliberations. On cross examination, he testified that he could not state that a bible was not brought into the jury deliberation room or that biblical passages were not discussed.

Juror Jesus Cordova

Mr. Cordova testified that no one brought a bible into the jury deliberation room at any time. He also indicated that no one discussed religion or biblical passages during jury deliberations.

Juror Braulio Elizalde

Mr. Elizalde testified that he did not see a bible in the jury room on either the first or second day of deliberations. He also indicated that there were no discussions about biblical passages. When he was interviewed by the Prosecution in March of 2003, he indicated that he could not remember whether there was a bible in the jury deliberation room. He testified that he simply has no memory of that and is unable to say that it didn't occur.

Juror Barbara Smith

Ms. Smith testified that she did not see any bibles in the jury deliberation room and did not hear any discussions about biblical passages on Friday. She did indicate that someone tried to bring up something about the bible during deliberations on Saturday morning, but it was stopped immediately. Ms. Smith indicated that this discussion lasted less than five minutes. She testified that she remembers that Jesus Cordova had a binder and recalls that someone was flipping through pages, but the binder was not shown to anyone. Ms. Smith indicated that Jesus Cordova had told her that he had been reading the bible the night before. She acknowledged that it would be difficult to remember everything that happened in 1995 and that she had refused to be interviewed at that time.

Juror Hazel Taylor

Ms Taylor testified that she did not see a bible in the jury room at any time. She indicated that on Saturday morning, Jesus Cordova attempted to discuss religion but was stopped by other jurors. Ms. Taylor granted the Prosecution an interview in March, 2003 but refused to be interviewed by defense investigators in 1995 and 2003. She testified that she was informed in 2003 that there were some issues about bible usage during deliberations and that this might result in the Defendant's sentence being overturned. She indicated that she did not want this to occur

C. Did juror use of the bible, bible index or notes with biblical passages occur when jurors were in the Fourth Step of their deliberations?

Juror Lana Eaton-Ochoa

During cross examination, Ms Eaton-Ochoa testified that when she consulted the bible, she had already made decisions about mitigation and aggravation. She testified that when she researched the bible in her hotel room on Friday evening, she was considering the fourth step – whether the imposition of the death penalty was appropriate. She seemed quite clear about this. However, during her direct examination she testified that her memory at the time of the hearing had faded and her memory about her service as a juror was better in 1995.

Juror Marietta Nowakowski

Ms. Nowakowski testified, during cross examination, that she had already made up her mind about the three

steps in the penalty phase process when she consulted the bible. However, on redirect examination, she acknowledged that she does not remember what the three steps were and did not remember what they were when she was interviewed by the Prosecution in March of 2003. She also testified that she read the bible on Friday evening because "I wanted to make the right decision.

Juror Steven Wright

During cross examination, Mr. Wright testified that he was already in the fourth step of the penalty phase deliberations when the references to biblical scriptures were made. However, on redirect examination, Mr. Wright acknowledged that he was not now able to say at what specific point on either Friday or Saturday aggravating circumstances were being discussed. Mr. Wright also testified that he is aware that bible use by jurors is an issue the Defendant is raising to try to get his death sentence overturned.

Juror Ann Trujillo

Ms. Trujillo testified on cross examination that she recalls that she had already made decisions concerning the three step penalty phase process when she researched biblical passages at her hotel room on Friday evening. However, at several points in her testimony she was unable to recall other details concerning her service as a juror.

Juror Lorrie Salter

Ms. Salter had difficulty remembering much about her jury service. During cross examination, Ms. Salter

testified that she couldn't remember whether biblical passages were discussed on Friday or Saturday during deliberations, but that she had already made up her mind on steps one, two and three and was in the fourth step when biblical passages were mentioned. On redirect examination, however, she testified that she had no idea when the biblical passages were discussed, acknowledged that they were discussed during deliberations and indicated that her decision about how she was going to vote on the death penalty was made before the penalty phase began.

Juror Roxie McCullough

Ms. McCullough testified that because of the lapse of time, she could not remember whether biblical passages were read from a book, notes or spoken. During cross examination, Ms. McCullough testified that she had completed steps one, two and three and was in the fourth step of the death penalty deliberations when biblical passages were mentioned. On redirect examination, however, she testified that she couldn't remember if the biblical passages were discussed on Friday or Saturday and that her decision about the death penalty was made before the penalty phase began.

Juror Ridawn Yantis Cummings

Ms. Yantis Cumming [sic] testified that she could not recall or remember details regarding her research of biblical passages. Ms. Yantis Cummings was able to state, however, that when she went back to her hotel room after the first day of deliberations, she was already in the fourth step of the penalty phase deliberation process.

Juror Barbara Smith

Ms. Smith testified that one of the jurors brought up biblical passages in the jury deliberation room on Saturday morning. She indicated that this discussion was short, lasting less than five minutes. She testified that when the discussion occurred, she had already completed step three and was in step four of the penalty phase deliberations.

Findings of Fact

None of the jurors who testified was eager or happy to testify. Some jurors, Lorrie Salter, Ann Trujillo, Steven Wright, Barbara Smith and Jesus Cordova, appeared defensive and at times resentful. A few of jurors, Hazel Taylor, Steven Wright and Jason Dockter, indicated that they had knowledge prior to the hearing that issues around bible usage might have significant consequences and their concerns about this were apparent in nonverbal expressions as they testified. They all appeared nervous. The ability to observe their manner and demeanor as they testified was critical. It was clear that the significant lapse of time since the trial had taken a toll on their abilities to recall or remember what transpired during their jury service in 1995. Some of the jurors freely and willingly granted interviews about their service in 1995. Others refused to grant interviews. All of these circumstances are of considerable importance and significantly weighty in assessing the credibility of the witnesses who testified at the hearing and in resolving the factual disputes presented by the evidence.

A) Several jurors read, researched and reviewed bibles and took notes from bibles in their hotel rooms during the Friday evening recess.

Four jurors, Lana Eaton-Ochoa and her roommate Ridawn Yantis Cummings, Marietta Nowakowski and Ann Trujillo read, reviewed or researched the bible to find biblical passages concerning God's position on the death penalty and government authorities on Friday evening, while sequestered, during the death penalty deliberations. Although Ms. Eaton-Ochoa's memory has faded because of the passage of time, she agreed to be interviewed by Ms. Knapp in 1995, when the events concerning her jury service were still fresh. Ms. Trujillo and Ms. Nowakowski also agreed to be interviewed in 1995. Ms. Cummings refused to be interviewed in 1995.

Ms. Eaton-Ochoa and her roommate, Ms. Yantis Cummings used Ms. Cummings' personal bible, which has a bible index, to locate biblical passages during the Friday evening recess. They searched for passages pertaining to the penalty for murder and the role of government and government authorities. Ms. Yantis Cummings was also searching for passages about "what to do and obeying the government in this case." As they located passages, the passages were written down on a sheet of paper, called a reference sheet. The reference sheet was prepared so that it could be presented the next day, when deliberations resumed, to at least one of the jurors, Jesus Cordova. The biblical passages they located included those that state, "fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him" and "whoever kills a man shall be put to death" and "I will

use you as a tool and if a man take a life, then his life shall be taken."

Ms. Trujillo read the hotel bible during the Friday evening recess. She researched specific passages related to punishment for murder. She found one passage that provided that if two or more people witness a murder, then the person responsible should be put to death. It is more likely than not that Ms. Trujillo wrote down the biblical passages she located on a piece of paper. She did this for the express purpose of taking her notes to the jury deliberation room to share with other jurors on Saturday morning when jury deliberations resumed.

Ms. Nowakowski also read her hotel bible during the Friday evening recess. She was searching for biblical passages about death. She wanted to see what God had to say about the penalty for murder.

Two other jurors, Steven Wright and Lorrie Salter, confirmed that some of the jurors had researched biblical passages about the penalty for murder during the Friday evening recess. Steven Wright claimed that he had difficulty remembering details of his jury service, but his inability to remember was more related to what seemed to be his concern that bible usage by jurors could result in the reversal of the Defendant's sentence. His manner and demeanor demonstrated this concern. The same can be said about Lorrie Salter. She remembered few details and claimed that she was "hounded" by the defense investigator in 1995 and told her what she wanted to hear. This claim, however, finds no support in the evidence.

Mr. Wright learned during the deliberations on Saturday morning that some jurors had read bibles Friday evening and had located several biblical passages that

provide, "if you kill, you shall be put to death". Similarly, Ms. Salter learned on Saturday morning during deliberations that one juror had stayed up most of the night researching the bible.

Five jurors, Hazel Taylor and the woman with whom she shared a hotel room, Barbara Smith, Braulio Elizalde, Jesus Cordova and Jason Dockter, testified that they did not see a bible in their hotel rooms during the death penalty deliberations in this case and indicated that they neither consulted, researched nor read the bible during the Friday evening recess.

Four of these jurors, Hazel Taylor, Barbara Smith, Braulio Elizalde and Jason Dockter refused to be interviewed in 1995, when events surrounding their jury service would have been fresh in their memories. Hazel Taylor refused a defense interview in 2003. Two jurors, Barbara Smith and Braulio Elizalde acknowledged that the passage of eight years affected their ability to remember events surrounding their 1995 jury service.

One juror, Jesus Cordova was adamant about his claim that he did not consult a bible, despite the fact that at least two other jurors, Barbara Smith and Lorrie Salter, indicated that he had told them he had stayed up the night before researching the bible. There were other problems with Mr. Cordova's credibility. He denied having a roommate during the time the jury was sequestered, yet clearly he had a roommate for at least a good portion of the time – Jason Dockter.

At least two of the five jurors who indicated that they did not consult bibles in their hotel rooms, Hazel Taylor and Jason Dockter, became aware prior to the hearing that the Defendant was alleging that bibles were being

consulted and that this might have legal significance. They indicated that they did not want their verdicts overturned.

Jesus Cordova consulted, read and researched the bible during the Friday evening recess. Given what other jurors, Lana Eaton-Ochoa, Steven Wright and Lorrie Salter have indicated, it is more likely than not that Mr. Cordova was looking for and located biblical passages about God's view of the death penalty. The remaining jurors did not research or consult bibles during the Friday evening recess.

Several jurors researched and reviewed bibles on Friday evening, June 30, 1995, to locate biblical passages pertaining to the penalty for murder. Some of the jurors wrote down the biblical passages they located so that they could take them to the jury deliberation room to share with other jurors on Saturday morning, July 1, 1995, when the jury reconvened to continue their deliberations.

B. Some jurors took a bible, bible index or notes with biblical passages into the jury deliberation room.

Five jurors, Lana Eaton-Ochoa, Marietta Nowakowski, Ann Trujillo, Lorrie Salter and Roxie McCullough, saw bibles in the jury deliberation room on Saturday morning, July 1, 1995, the second day of deliberations in the death penalty phase of Defendant's trial. These same jurors observed biblical scriptures read from the bibles and observed, and participated in, discussions about these scriptures in the jury deliberation room Saturday morning. Two jurors, Marietta Nowakowski and Lorrie Salter,

also saw bible indexes or study bibles in the jury deliberation room that Saturday morning.

Ms. Eaton-Ochoa granted a defense interview in 1995, when events were fresh in her mind and before she was aware that using a bible in the jury deliberation room might have legal significance. She took a bible into the jury deliberation room on Saturday morning to show juror Jesus Cordova the biblical scriptures she had researched and located on Friday evening.

Ms. Eaton-Ochoa showed those scriptures to Mr. Cordova. She also saw a bible index in the jury deliberation room on Saturday morning.

Ms. Nowakowski was interviewed in 1995, when her memory about the events concerning her jury service was better than it is today. She too saw a juror bring a bible into the jury deliberation room on Saturday morning. The bible was a study bible, which contained an index and enabled the user to locate biblical passages by looking up specific words. She saw the bible opened up and heard someone reading biblical passages. She observed that some of the jurors that morning were interested in looking up passages in the bible concerning what God felt the government's position was when it comes to judging people who murder other individuals.

Ms. Trujillo also granted Ms. Knapp an interview in 1995, when she could best remember the events concerning her jury service. It is more likely than not that Ms Trujillo saw a bible in the jury room on Saturday morning when the jury deliberations resumed and observed the bible opened up and read to other jurors. Ms. Trujillo observed biblical passages being read and jurors "going back and forth" with what they had copied from the bible

the night before. Ms Trujillo said that she may have brought her notes with biblical passages into the jury room. In fact, it is also more likely than not that Ms. Trujillo took her notes prepared the evening before and shared them with other jurors. It is also more likely than not that Ms. Trujillo saw other jurors bring notes with biblical passages on Saturday morning and observed them being shared with other jurors. The biblical passages she heard discussed included, "eye for an eye, tooth for a tooth."

Ms. Salter had difficulty, during her testimony, remembering whether she saw a bible in the jury room. She did grant the defense an interview in 1995. Although she claims that she was "hounded" into giving an interview and gave responses the investigator wanted to hear, she willingly cooperated and was not pressured to give anything but an accurate account of what had transpired. She saw two and perhaps as many as three jurors take bibles into the jury deliberation room on Saturday morning. At one point during jury deliberations, she saw Juror Jesus Cordova with a bible index. She observed biblical passages being discussed on Saturday morning. Ms. Salter remembers at least two biblical passages were looked up in the bible and discussed as the jury deliberated. One of the passages was "eye for an eye, tooth for a tooth" and the other was, "if you kill somebody, automatically your life is given up because you've taken another".

Ms. McCullough was unable to recall that a bible was in the jury room during jury deliberations in the death penalty phase. She attributes this to poor memory caused by a lapse of time. However, she was interviewed by a television news reporter in 2001 and spoke to him about bibles and biblical passages in the jury deliberation room.

Her statements to the reporter were credible. Ms. McCullough too saw bibles in the jury room and observed biblical passages read to other jurors. One of the biblical references she heard was "if a person takes a life, their life must be taken."

One juror, Steven Wright indicated that he believed that notes with biblical passages were present and discussed in the jury deliberation room on Saturday morning. Mr. Wright doesn't remember a bible being present but believes that some jurors had notes with biblical passages in the jury deliberation and discussed them. Mr. Wright learned that some jurors had studied the bible the night before and found "about ten different places in the bible" where it says "if you kill, you shall be put to death". It is more likely than not that Mr. Wright observed notes with biblical passages being discussed in the jury deliberation room on Saturday morning.

Three jurors, Ridawn Yantis Cummings, Jason Dockter and Braulio Elizalde, cannot remember or recall whether bibles or notes with biblical passages were in the jury deliberation room at anytime during the penalty phase deliberations. All three jurors refused to be interviewed in 1995, when events about their jury service would have been fresh in their memories. Throughout her testimony, Ms. Yantis Cummings indicated she could not remember or recall events about which she was questioned. She shared her bible, her notes containing biblical passages about "what to do and obeying the government in this case" and discussed her notes with her roommate, Ms. Eaton-Ochoa on Friday evening. She doesn't remember, however, whether she took her bible or her notes to the jury deliberation room the next day. Mr. Dockter and Mr. Elizalde can't say, one way or the other, whether bibles

were in the jury deliberation room or whether biblical passages were discussed.

Three jurors, Jesus Cordova, Barbara Smith and Hazel Taylor claim that no bibles were present in the jury room and that no significant discussions about biblical passages occurred. However, at least one juror, Ms. Salter, saw Mr. Cordova with a bible index in the jury room. Ms. Smith saw Mr. Cordova with a binder, more likely than not filled with biblical passages written down the evening before as he researched the bible.

The testimony of jurors Cordova, Smith and Tayler [sic] was not persuasive for several reasons. First, their testimony is contradicted by other more credible evidence. Second, Jesus Cordova's testimony was impeached by evidence that directly contradicts his claims that he did not have a roommate, that he did not consult or research a bible on Friday evening and that he does not have severe memory problems due to significant medical conditions. Third, Barbara Smith and Hazel Taylor refused to grant interviews to defense investigators at a time when events would have been more fresh in their memories. Finally, at least one of the jurors, Hazel Taylor, learned, prior to the hearing, that claims were being made that bibles had been used by jurors and that this might result in the Defendant's sentence being reversed.

Jurors took bibles and notes with biblical passages concerning the penalty for murder into the jury deliberation room on Saturday morning, July 1, 1995. These materials were read and discussed among and between jurors prior to a verdict being reached.

C. The evidence did not show that juror use of the bible, bible index or notes with biblical passages occurred only when jurors were in the fourth step of their deliberations.

Prior to the hearing, this Court determined that jurors could be asked to indicate at what step in the four step process of the penalty phase deliberations each was at when they were exposed to extraneous information or outside influences and that this inquiry would not violate CRE 606 (b). The Defendant contends that the Court's ruling was erroneous in that permitting testimony that a juror had decided the first, second or third step before the jury misconduct occurred requires implicit disclosure of "matter . . . occurring" during deliberations and as such, violates CRE 606 (b). According to the Defendant, allowing this line of questioning requires jurors to reveal what they were thinking at the time the extraneous information was introduced. Alternatively, the Defendant argues that whether or not jurors were in the fourth step of the process is not significant because the four-step process is not an irreversible one. At any point in time before signing the verdict form, jurors may change their minds. The Defendant's arguments, though persuasive, are academic. The evidence that certain jurors were in the fourth step of the process when extraneous information or outside influences was introduced is not credible and therefore, of no legal significance.

Two jurors, Lorrie Salter and Roxie McCullough indicated that they had completed step three and were in step four of the penalty phase process when bibles and bible passages were introduced into the jury deliberation room. However, neither could remember whether the

biblical passages were introduced or discussed on Friday or on Saturday. They simply had no idea when in the process the extraneous information was introduced. Incredibly, each indicated that they had made their penalty phase decisions even before the penalty phase began. Their testimony is not persuasive or credible.

Two jurors, Barbara Smith and Ridawn Yantis Cummings also testified that they had completed step three and were in the fourth step of the penalty phase process when bibles or biblical passages were introduced into the jury deliberation room. Both jurors refused interviews in 1995, when events were fresh in their memories and before anyone had any indication that issues about bibles in the jury room would be raised. Ms. Yantis Cummings had difficulty during her testimony recalling important details about her jury service. Ms. Smith's testimony about bible and biblical passages in the jury room was contradicted by other weighty and credible evidence. The manner and demeanor of these jurors as they presented their testimony, coupled with the factors noted above leads to the conclusion that their testimony is not credible on this important point.

Two other jurors, Marietta Nowakowski and Steven Wright, testified that they were in the fourth step of the penalty phase process when bibles or bible passages were discussed in the jury deliberation room. However, both jurors had difficulty recalling other significant points during their testimony. Ms Nowakowski couldn't remember what the different steps of the process were during her testimony and couldn't remember what they were when the Prosecution interviewed her in March, 2003. Mr. Wright couldn't state when aggravating circumstances were discussed. Moreover, Mr. Wright was aware that

juror use of bibles could result in reversal of the death penalty at the time of the hearing. Under these circumstances, the testimony of these two jurors that they were in the fourth step of the penalty phase process was not persuasive or credible.

Finally, two jurors, Ann Trujillo and Lana Eaton-Ochoa, indicated that they had completed the third step of the four-step process in the penalty phase deliberations when biblical passages were researched and bibles consulted. However, during their testimony each had difficulty remembering other important details. Ms. Eaton-Ocho [sic] acknowledged that her memory has faded over time. Ms. Trujillo had concerns about testifying and was aware that her presence at the hearing was required by the Defendant. Her displeasure was apparent in her demeanor and mannerisms on the stand. The manner and demeanor of each juror, together with the factors noted above compels the conclusion that these two jurors' assertions that they had completed step three of the process at the time they were exposed to extraneous information lack credibility.

Jurors were exposed to bibles and bible passages concerning God's view on punishment for murder while they were sequestered during their deliberations on the penalty phase of the Defendant's trial. This occurred when they took the evening recess on Friday, June 30, 1995 and when they resumed their deliberation on Saturday, July 1, 1995. The biblical passages were read and discussed in the jury room. This occurred prior to the jury reaching a unanimous verdict. The credible evidence does not indicate that jurors were at a particular step in the four step process. What is certain

is that a verdict imposing the death sentence had not been reached at the time the extraneous materials were considered.

Conclusions of Law

A) The death penalty verdict must be vacated under, the *Wiser* test because jurors were exposed to extraneous biblical code during their sequestration and penalty phase deliberations.

As noted above, the Colorado Supreme Court adopted an objective test to determine whether jury exposure to extraneous information or outside influence requires that a verdict be overturned or vacated in *Wiser v. People, supra.* A defendant's conviction must be reversed "where there is a reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations." *Wiser* v. *People, supra,* 732 P.2d at 1143; *Wadle* v. *People,* ___P.3d___ (Colo. App Jan.30,2003).

The Defendant, in alleging jury misconduct, is permitted to introduce evidence to establish that extraneous matters improperly influenced the verdict but how the improperly received information was used by the jury in their deliberative process is not a proper subject of inquiry. *Wadle* v. *People; supra; Vento* v. *Colo. Nat'l Bank-Pueblo,* 907 P.2d 642 (Colo. App.1995).

To meet his burden under *Wiser,* the Defendant is not required to show that the entire jury was exposed to the extraneous information or outside influence. If only one juror has been exposed to extrinsic material, that juror's "improperly influenced vote deprives the defendant of an

unprejudiced, unanimous verdict." *Lawson* v. *Borg*, 60 F.3d 608, 613 (9th Cir. 1995). The unanimity of jury verdicts is of paramount importance in death penalty cases in Colorado, where each juror has the power to veto a death sentence if he or she is not convinced beyond a reasonable doubt that death, rather than life in prison, is the appropriate penalty and where the death penalty cannot be considered by the jury unless and until all twelve individual jurors are convinced that the mitigating factors do not outweigh proven statutory aggravating factors. *See, People v. Dunlap*, 975 P.2d 723 (Colo. 2000); *Tenneson* v. *People*, 788 P.2d (1990).

If there is a reasonable possibility that juror exposure to biblical passages requiring that death be the punishment whenever an individual takes another person's life and commanding jurors to follow government authorities affected any one or more juror's decision to return a death verdict in this case, then under *Wiser* the death sentence must be vacated. Here, several jurors researched and reviewed bibles on Friday evening, June 30, 1995, to locate biblical passages pertaining to the penalty for murder. Some of the jurors wrote down the biblical passages they located so that they could take them to the jury deliberation room to share with other jurors on Saturday morning, July 1, 1995, when the jury reconvened to deliberate on a verdict. Jurors took bibles and notes with biblical passages concerning the penalty for murder into the jury deliberation room on Saturday morning, July 1, 1995. These materials were read and discussed among and between jurors prior to a verdict being reached. Jurors were exposed to bibles and bible passages concerning God's view on punishment for murder, while they were sequestered, during their deliberations on the penalty phase of the

Defendant's trial and when the jury resumed their deliberations the next day.

The biblical passages involved not only encouraged the death penalty but required that it be imposed when another life is taken. The passages also directed jurors to take guidance from and obey the government. They left jurors with no discretion. Given the nature of the biblical passages jurors read and discussed, the Wiser standard has been met since there is a reasonable possibility that the jurors' exposure to these biblical passages affected one or more juror's decision to return the death penalty verdict.

Colorado appellate courts have reversed convictions where jurors have improperly reviewed reference material or conducted independent research. *See Alvarez* v. *People*, 653 P.2d 1127 (Colo. 1982) (reversal required where juror used a dictionary); *People* v. *Wadle, supra* (reversal required where juror downloaded Internet description of Paxil, which was prescribed for the defendant, and juror brought this description into the jury room); *T.S.* v. G.G., 679 P.2d 118 (Colo. App. 1984 (reversal required in paternity case where juror read "pre-med text book describing the accuracy of Human Leukocyte Antigen test); *Niemand v. District Court*, 684 P.2d 931 (Colo. 1984) (reversal required where juror resorted to Black's Law Dictionary to look up terms). No Colorado appellate decision has been cited which has considered the prejudicial impact of a bible on jury deliberations.

Case law submitted by the parties in this indicates that several courts in various jurisdictions have considered the prejudicial impact of biblical passages on jury verdicts. A prosecutor's invocation of a biblical "higher law

or extra-judicial authority" in closing argument was determined to be unconstitutional in *Sandoval*, v. *Calderon* 241 F.3d 765, 777 (9th Cir. 2001). Another prosecutor's argument drawing on his reading of biblical law to justify the morality of the death penalty was determined to be improper in *Bennett* v. *Angelone*, 92 F.3d 1336 (4th Cir. 1996). The presence of a bible and other religious documents during jury deliberations denied the defendant a fair and impartial sentencing hearing and required reversal in *Scott* v. *Kennedy*, 216 F.3d 1088 (10th Cir. 2000). A judge's decision to honor a jury's request to send a bible into the jury room was reversible error because the judge had "permitted the jury to deliberate with the aid of a specific, extra-judicial code of conduct, a code which mandates death for numerous offenses . . . " *Jones* v. *Kemp*, 706 F. Supp. 1534, 1558 (D.C.Ga. 1989) Other courts have also disapproved of the use of bibles and biblical law in death penalty cases. See, *Glossip* v. *State*, 29 P.3d 597 (Okla. Crim. App. 2001); *State* v. *Harrington*, 627 S.W.2d 345 (Tenn. 1981).

The biblical passages considered and used by several jurors is contrary to Colorado death penalty law. In Colorado, whenever the death penalty is sought, life in prison is always a permissive penalty for first degree murder. In fact, it is mandated unless all twelve jurors are convinced beyond a reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors and that death, rather than life, is the appropriate penalty. The biblical passages involved require that death be the punishment whenever an individual takes another person's life. They mandate death as a penalty whenever there is more than one witness to the murder or whenever the government seeks to the death penalty. These biblical

passages are in conflict with Colorado law and had the capacity to influence the jurors who were exposed to them. The use of these biblical passages violated the Defendant's right to have his sentence decided on the basis of the evidence and the law set forth in the trial court's Instructions of Law. *See. Alvarez* v. *People, supra* and *Wadle* v. *People*, supra.

Several jurors took it upon themselves to research biblical code to determine God's view of the penalty for murder and shared the information with other jurors during their deliberations. Contrary to the argument of the Prosecution, the biblical research and reading that occurred here was not done for comfort or inspiration. It was for the purpose of guiding and directing certain jurors to a particular verdict. Those jurors brought the fruit of their research into the jury room and shared it with other jurors. Once this occurred, a unanimous verdict imposing the death sentence was reached. Under these circumstances, there is at the very least, a "reasonable possibility" that the extraneous materials improperly influenced several jurors into rejecting a life sentence for the Defendant.

The juror's reliance on the specific biblical passages cannot be considered "benign" as the Prosecution contends. Ms. Eaton-Ochoa read and wrote down the cite to Romans 13:1, which requires that one look at government authorities as God's representative on earth and follow their lead as agents of "wrath to bring punishment to the wrongdoer." This and other passages the jurors considered do more than simply encourage jurors to follow the instructions of the court. The passages mandate that death be the penalty for murder.

Contrary to the Prosecution's argument, the length of time spent by jurors discussing biblical passages has no legal significance. The jurors involved not only discussed biblical passages in the jury room, they spent the evening before researching and reading biblical passages dealing with the punishment for murder. Further, even if a brief period of time was spent on the biblical passages in question, the specific passages involved presented a reasonable possibility of improperly influencing several jurors into voting for the death penalty.

B) Resort to biblical law cannot be deemed harmless error nor invited error.

One of the Prosecution's alternative arguments is that even if jurors used biblical passages in reaching their verdict, the Defendant's sentence does not have to be overturned because the use of biblical passages could not have influenced the verdict. According to the Prosecution, the trial court took appropriate steps during the voir dire process to conduct a fair jury selection process, the Instructions of Law were clear and comprehensive. This and the "overwhelming evidence of guilt", the Prosecution contends, renders any error that occurred harmless. This Court was not the trial court and the entire record is not available to the Court for review. It would not be possible to do the "harmless error" analysis proposed. Further, this Court agrees with the Defendant's position that under CRS 16-11-103 (6) (b), harmless error analysis is not applicable to a death sentence. That statute requires that the Court vacate a death sentence if imposed under "the influence of passion or prejudice or any other arbitrary factor." The introduction of biblical law into the death penalty deliberations is such an impermissible factor.

Another argument advanced by the Prosecution that counsel for the Defendant introduced religion and biblical references in closing argument in such a way as to invite or even encourage jurors to refer to biblical passages in their deliberations. The doctrine of invited error has no application here.

A party may be precluded from complaining about an error "that he has invited or injected into the case." *Horton* v. *Suthers*, 43 P.2d 611 (Colo. 2002). No Colorado case has been cited which applies the doctrine to bar a claim that undermines the reliability of a death sentence and no case has been cited which holds that jury misconduct can be invited by a closing argument delivered by counsel. Moreover, the Defendant's counsel did not ask jurors to open bibles to assist them in determining the appropriate sentence. The closing argument made by the Defendant's attorney was in all respects appropriate and cannot be fairly characterized as one which invited error.

CONCLUSION

The jury supervision performed in this case was extremely negligent and appallingly lax. While jurors were appropriately sequestered and efforts at preventing exposure to prejudicial media were engaged in, no steps were taken to insure that jurors were not exposed to the extraneous information and outside influences that they were exposed to here.

Although not the trial court who presided over the Defendant's trial, this Court has reviewed a sufficient amount of the record to enable it to say that the descriptions of the crimes the Defendant committed were among

the most grievous, heinous and reprehensible this Court in its 18-year judicial career has ever had occasion to review.

And if any case merits the death penalty, there cannot be serious debate about this case being that case. The death penalty, however, must be imposed in a constitutional manner. Jury resort to biblical code has no place in a constitutional death penalty proceeding. *See*, *Sandoval* v. *Calderone, supra; Jones* v. *Kemp, supra* and *Bennett* v. *Angelone, supra.* The death sentence imposed here must therefore be vacated and set aside.

IT IS THEREFORE ORDERED that the death sentence imposed against the Defendant Robert Eliot Harlan is hereby vacated and set aside. It is further ordered that the Defendant shall be returned to and appear before this Court as promptly as is possible so that he may be resentenced, pursuant to, and consistent with, Colorado law.

Dated this May 22, 2003.

/s/ John J. Vigil
John J. Vigil District Court Judge
17th Judicial District
Adams County, Colorado

DISTRICT COURT, ADAMS COUNTY, COLORADO

Case No. 94CR187 Division E

MOTION TO VACATE THE DEATH SENTENCE DUE TO JURORS' USE OF BIBLE DURING PENALTY PHASE DELIBERATIONS [244]

(Filed Oct. 25, 1995)

PEOPLE OF THE STATE OF COLORADO, Plaintiff

v.

ROBERT ELIOT HARLAN, Defendant

Robert Harlan moves this court for an order vacating the death sentence in this case.

AS GROUNDS IN SUPPORT:

I. INTRODUCTION

1. The jurors in Mr. Harlan's case brought Bibles with them into the jury room during their sentencing phase deliberations. At least some of the jurors also studied the Bible in their hotel rooms during the overnight break in deliberations on Friday, June 30, 1995. The biblical passages relied on by the jury were those that require an automatic death penalty when a person is guilty of murder. *See* attached Affidavit of Raelee Knapp, the contents of which are incorporated by reference into this motion. As set forth below, the jury's use of the Bible during sentencing phase deliberations clearly affected the jurors' deliberations in the penalty phase of Mr. Harlan's trial and require that the jury's death verdict be vacated.

2. Under Colorado law, when jurors rely on extraneous information or extraneous influence in their deliberations and "there is a reasonable possibility that [the] extraneous information or influence affected the verdict," the verdict must be vacated. *Wiser v. People*, 732 P.2d 1139 (Colo. 1987). Under the objective test adopted by the supreme court in *Wiser,* the death sentence in this case must be vacated since there is a "reasonable possibility" that the jurors' use of the Bible "affected the verdict to the detriment of the defendant." *Wiser, supra* at 1142.

II. THE FACTS REQUIRING VACATION OF THE DEATH SENTENCE AND IMPOSITION OF A LIFE SENTENCE

3. On Friday, June 30, 1995, the first day of penalty phase deliberations, a juror brought a Bible and Bible index into the jury room during deliberations.

4. Several of the jurors, including the foreman, decided they would read their Bibles Friday night prior to resuming deliberations on Saturday morning, July 1st.

5. On Saturday morning, when the jurors returned to the jury room and resumed their penalty phase deliberations, either two or three jurors brought Bibles with them. One juror had a Bible index which allowed the jurors to search the Bible for information on God's view of capital punishment. In addition, some of the jurors brought in bible passages which they had written down on Friday night during the break in their deliberations. These handwritten bible passages were read and discussed by the jurors during their deliberations.

6. The jurors also read from the Bible during deliberations. Specifically, the jury foreman recalls reading a passage from the Bible that requires the death penalty when there is more than one witness against a person. This passage appears to be from either Deuteronomy or Numbers, which provide:

> So these things shall be for a statute of judgment unto you throughout your generations in all your dwellings. Who so killeth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die. Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death.

Numbers 35:29-35:31.[1]

> At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.

Deuteronomy 17:6; *see also* Deuteronomy 19:15; 19:21 (quoted below in paragraph 10).

7. Juror Lana Eaton recalls that during deliberations a biblical passage was read and discussed, which involved God telling man that he would use him as a tool, and if one man takes another's life, the same must be done to him.

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[1] For the sake of uniformity, all biblical quotations in this motion are from the King James Version of the Bible.

8. Juror Eaton, like the foreman, studied the Bible during the evening break in sentencing deliberations juror Eaton and her roommate[2] wrote down verses that related to capital punishment. According to foreman Trujillo, several jurors brought bible verses with them when they resumed deliberations on Saturday morning.

9. Juror Lorri Salter specifically remembers two Bible passages being read in the jury room before the death verdict was reached on the Saturday morning of deliberations: one passage involving "an eye for an eye" and one which provides, in Juror Salter's words, that "if you kill somebody, that you're automatically, your life is given up because you've taken another. . . . if you've taken one of God's creatures or, you know, man, that you're automatically – the sentence for that is death."

10. The "eye for eye" passage read by the jurors during deliberations comes from one of the following passages from the Old Testament, which provides in pertinent part:

> He that smiteth a man, so that he die, shall be surely put to death. . . . And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.

Exodus 21:12, 21:23-21:25

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[2] Counsel for Mr. Harlan learned that the jurors were assigned roommates and shared hotel rooms during their sequestration only after the sentencing verdict was returned. If defense counsel had had notice that the court was considering requiring the jurors to share hotel rooms during sequestration, they would have objected.

> And he that killeth any man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast. And if a man cause a blemish in his neighbor, as he hath done, so shall it be done to him again. And he that killeth a beast, he shall restore it: and he that killeth a man, he shall be put to death. Ye shall have one manner of law, as well for the stranger, as for one of your own country: for I am the Lord your God.

Leviticus 24:17-22.

> One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established. . . . And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

Deuteronomy 19:15; 19:21

11. The automatic death penalty passage may include any of the passages quoted above in paragraph 10 or may be from any of the following chapters and verses of the Bible:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death. And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death, Or if he smite him with a hand weapon of wood, wherewith he my die, and he die, he is a murderer: the murderer shall surely be put to death. . . . Moreover ye shall take no satisfaction for the life of a murderer, which

is guilty of death: but he shall be surely put to death.

Numbers 35:16-35:18, 35:31-35:32.

12. In discussing the biblical passages that were read during deliberations, Juror Salter specifically volunteered that there were no biblical passages read that suggested "life in prison" as an appropriate penalty for murder.

III. THE LAW REQUIRING VACATION OF THE DEATH SENTENCE AND IMPOSITION OF A LIFE SENTENCE

13. The biblical passages used by the jury in its sentencing deliberations were contrary to controlling statutory and constitutional law. The extraneous biblical passages went to the only issue to be decided by the jurors in the penalty phase of this case: whether Mr. Harlan's life would be taken or spared. It cannot be said that there is no reasonable possibility that the jury's use of the Bible did not affect the verdict. Accordingly, the jury's death verdict must be vacated. *See Wiser, supra.*

14. The biblical law used by the jurors in their deliberations requires the imposition of the death penalty whenever one man takes the life of another human being. This is clearly not the law of Colorado. *See* §16-11-103, C.R.S.; *see also Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980) ("If a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . . It must channel the sentencer's discretion by

'clear and objective standards' that provide specific and detailed guidance. . . . ")

15. The biblical passages relied on by the jury are also completely contrary to minimum federal constitutional requirements. *See Godfrey v. Georgia, supra* (a constitutional sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many in which it is not); *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct 2978, 49 L.Ed.2d 944 (1976) (mandatory death penalty is unconstitutional). The biblical passages set forth a religious law that embraces a mandatory death penalty that violates the Eighth Amendment of the United States Constitution.

16. The fact that the jurors went outside the instructions of law given by the court was prejudicial in and of itself. The fact that the biblical law the jury used is diametrically opposed to state and federal law makes the jury's exposure to this extraneous information in the form of the Bible all the more prejudicial. The jurors' reliance on biblical law requiring the imposition of the death penalty in all cases of murder, reduced the jurors' sense of individual responsibility for their decisions and injected a totally improper consideration into the jury's deliberation process.

17. Under Colorado law, reversible prejudicial error occurred when the jurors relied on the Bible in their deliberations. As set forth in *Niemand v. District Court,* 684 P.2d 931 (Colo. 1984), "[j]urors are required to follow only the law as it is given in the court's instructions; they are bound, therefore, to accept the court's definitions of any ambiguities in terminology from the trial judge, not from extraneous sources." In *Niemand,* a murder case, a juror consulted *Black's Law Dictionary* to resolve her

uncertainty in favor of voting for second degree murder. The supreme court found the juror's reliance on an extraneous source required a new trial, notwithstanding the fact that the dictionary definitions imposed greater burden on the prosecution than did the jury instructions.

18. Similarly, in *Alvarez v. People,* 653 P.2d 1127 (Colo. 1982), *rev'g* 624 P.2d 358 (Colo. App. 1980), the supreme court reversed the defendant's conviction where a juror used a dictionary to determine meaning of words found in the reasonable doubt instruction and relayed this information to another juror. Similarly, in *People v. Cornett*, 685 P.2d 224 (Col. App. 1984), the court reversed the defendant's conviction where the jurors read a prejudicial news article in the jury room.

19. Clearly, under the applicable objective test set forth in *Wiser* and in light of the analogous cited Colorado cases, the jury's use of the Bible and the "automatic death penalty" passages it contains "could possibly have affected the verdict" and, therefore, the jury's death verdict must be vacated. The jury's reliance on an extraneous source of law, one which mandates the death penalty without regard to mitigating circumstances, cannot be disregarded. The fact that the jurors felt compelled to use the Bible as an extrajudicial source of law, in and of itself, would require reversal of the death sentence. The nature of the biblical passages relied on by the jury, which are so contrary to governing secular law, absolutely mandate the vacation of Mr. Harlan's death sentence.

20. In an analogous death penalty case, the Pennsylvania Supreme Court found it was *per se* reversible error for the prosecutor to argue in his penalty phase closing that the Bible says "and the murderer shall be put to

death." *Commonwealth v. Chambers,* 599 A.2d 630, 528 Pa. 558 (1991). In *Chambers*, the appellate court reversed the death sentence even though the trial court sustained defense counsel's objection to the prosecutor's argument and gave the jury contemporaneous caution instruction.

The appellate court reversed the death sentence since the prosecutor had improperly injected religious law as an additional factor for the jury's consideration. "Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty." *Id.* at 644. The Pennsylvania court strongly disapproved any "argument by the prosecutor [that] advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment." *Id.* Moreover, the court concluded that:

> By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. . . .
>
> Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was

> satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.
>
> Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth, we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death,. . . .

Commonwealth v. Chambers, 599 A.2d at 644.

21. The prejudice in Mr. Harlan's case is even more severe and obvious than it was in *Chambers*, since the jurors in that case were instructed by the court to disregard the prosecutors argument. Here, the jurors were not expressly instructed by the court that they could not rely on biblical law and there is no doubt that the jurors did, in fact, use the Bible and biblical law, which conflict with the law of the State of Colorado, in reaching their verdict.

22. Another analogous death penalty case is one out of Georgia in which the trial judge allowed the jury to bring a Bible with it to the jury room without objection. The Georgia Supreme Court held that, while the trial judge erred in permitting a Bible to go out with jury during sentencing deliberations, the defendant was not harmed by the. *See Jones v. Francis* 252 Ga. 60, 312 S.E.2d 300, *cert. den'd*, 83 L.Ed.2d 157 (1984). Subsequently, the defendant's death sentence was vacated by the federal district court, which held it was reversible constitutional error for the trial court to permit a bible to go to jury room at the jury's request. *Jones v. Kemp,* 706 F.Supp. 1534 (1989).

23. In *Jones v. Kemp,* the federal court recognized that due process is undermined when the jury seeks instruction in the law from a source other than the court. *Id.* at 1558.

> It is well settled that religion may not play a role in the sentencing process.
>
> The jury which sentenced the petitioner had a duty to apply the law of the State of Georgia as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the petitioner should live or die. Yet the court permitted the jury to deliberate with the aid of a specific, extra-judicial code of conduct – a code which mandates death for numerous offenses . . . (as well, of course, as containing enjoinders of mercy and forgiveness elsewhere). To the average juror, Webster's Dictionary may be no more than a reference book . . . but the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind. When, as here, a Bible was present in the jury room with the explicit unqualified approval of the court, it has great potential to influence the jury's deliberations.
>
> The record indicates that the jury took a Bible into the jury room at the very start of deliberations in the sentencing phase of petitioner's trial. The record clearly indicates the members of the jury intended to use the Bible in some way or for some purposes. How the jurors used the Bible, whether as a silent monitor witnessing that the jurors approached their solemn task in the proper attitude, or for guidance as to their specific task, the Court cannot ascertain. A search for the command of extrajudicial "law" from any

> source other than the trial judge, no matter how well intentioned, is not permitted. The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction.

Id. at 1558-1559 (citations omitted).

24. Although *Jones* is factually distinguishable in that the jurors in Mr. Harlan's case did not obtain the court's express permission to bring the Bible with than into the jury room, the logic of *Jones* is compelling since the jurors in this case did, in fact, resort to extrajudicial biblical law in reaching their verdict. Thus, the jury's verdict is flawed because the Bible has "great potential to influence the jury's deliberations" and because "It cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction." *Id.*

25. The error arising from a juror's use of the Bible to determine whether a capital defendant should live or die is plain. For example, in a case reversed on *Witherspoon* grounds, the court recognized that the fact that the foreman read biblical passages in the jury room to buttress his argument for the death penalty "of course, was error which would have required a new sentencing hearing absent the error in excluding jurors for cause in violation of the Witherspoon standard." *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981).

26. In summary, the jury's use of the Bible in its penalty phase deliberations requires that the death sentence be vacated. This result is compelled both by Colorado's *Wiser* test which requires reversal when extraneous information or material "could possibly have affected the verdict," and by governing constitutional principles, which require that a jury's discretion be adequately directed by governing secular legal principles and that jurors understand their individual responsibility in imposing sentence; and which prohibit the mandatory or automatic imposition of the death penalty.

27. Mr. Harlan makes this motion under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Trial by Jury, Compulsory Process, Ex Pest Facto, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the federal and Colorado Constitutions.

IV. REQUEST FOR HEARING

28. Pursuant to CRE 606(b), no party can present evidence of "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any jurors." CRE 606(b); *see Ravin v. Gambrell,* 788 P.2d 817 (Colo. 1990). Notwithstanding this evidentiary bar to much juror testimony, the rules of evidence allow Mr.

Harlan to present testimony that the jurors in his case were exposed to extraneous material in the form of the Bible; that this extraneous text was used by the jurors both in the jury room during deliberations and in their hotel rooms during the overnight break in deliberations; and that the unanimous death verdict was not reached by the jury until after the jury made use of the Bible.

29. Mr. Harlan requests a hearing on this motion. The notice of appeal in this case is due on December 4, 1995. Pursuant to C.A.R. 4, this Court retains jurisdiction to hear this motion.

Respectfully submitted this 24th day of October, 1995.

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Attorneys for Robert Harlan

CERTIFICATE OF SERVICE

I certify that on October 25th, 1995, a copy of this pleading was served on Robert S. Grant, District Attorney, 450 South Fourth Avenue, Brighton, Colorado, 80601, by: hand delivery to Mr. Grant ___; hand delivery to Mr. Grant's office or authorized representative X ; U.S. mail postage prepaid ___; facsimile transmission to Mr. Grant's office ___.

/s/ Kris Walker

DISTRICT COURT, ADAMS COUNTY, COLORADO

Case No. 94CR187 Division E

AFFIDAVIT OF RAELEE KNAPP

PEOPLE OF THE STATE OF COLORADO, Plaintiff

v.

ROBERT ELIOT HARLAN, Defendant

I, Raelee Knapp, being first duly sworn upon my oath state, as follows:

1. I am an investigator in the Colorado State Public Defender's Office. I am the lead investigator on Mr. Harlan's case.

2. Two weeks after the court imposed sentence on Mr. Harlan, I began to contact jurors to see if they would be willing to speak to me about, their jury service. Before interviewing any juror, I told them that I was aware that the jurors had not wanted to talk about the case at the time of the verdict and that I respected that. I told them I did not mean to intrude on their privacy, but I was calling to see if, at this time, they had any questions or wanted to speak about their juror service.

3. I contacted all 12 jurors who deliberated in Mr. Harlan's case. Six of the jurors indicated that they did not wish to speak with me; five jurors agreed to speak to me; and I am still in the process of trying to arrange a convenient time for the last juror to speak with me.

4. In speaking to the jurors who agreed to speak with me, I learned that some of the jurors brought Bibles

with them into the jury room during penalty phase deliberations; that the jurors read the Bible during their deliberations; and that at least some of the jurors studied the Bible during their overnight break in penalty phase deliberations. I learned that before the Bible was used in deliberations there were jurors who had favored a life sentence, and that it was only after the Bible was used by jurors that the jury unanimously agreed to a death sentence in Mr. Harlan's case.

5. Of the five jurors who agreed to speak with me about their jury service, four spoke to me about the jury's use of the Bible during deliberations: Lana Eaton; Lorri Salter; Marietta Nowakowski and the foreman Ann Trujillo. The fifth juror who spoke to me about his jury service, Jason Dockter, declined to be interviewed about any part of the jury's deliberations so I was unable to question him about the jury's use of the Bible during deliberations.

6. I spoke with the jury foreman Ann Trujillo on September 19, 1995, and on October 16, 1995, Ms. Trujillo told me that there were initially four jurors who were ready to vote for a life sentence. She said the Bible assisted them in reaching their death verdict. According to Ms. Trujillo, during penalty-phase deliberations, one of the jurors brought a Bible Index to the jury room and a few of the jurors brought Bibles. She also said that the jurors' hotel rooms had Bibles in them. Ms. Trujillo read the Bible Friday night (June 30th), during the overnight break in penalty phase deliberations. She is aware that other jurors also read the Bible that night, and took notes, which they brought with them into the jury room on Saturday morning (July 1st) and discussed. Ms. Trujillo distinctly recalled reading a passage that said a person must be put to

death for killing another when there are two or more witnesses against the person. She remembers discussing this passage during deliberations.

6. On September 26, 1995, I interviewed juror Marietta Nowakowski. Juror Nowakowski confirmed that there were a few jurors who were initially in favor of a life sentence for Mr. Harlan. She also confirmed that a Bible was used by the jurors and that it was only after the Bible was used that the jury reached a unanimous verdict. According to Juror Nowakowski, one of the jurors brought a "study bible" with them to the jury room on Saturday morning. The study Bible had an index that allowed one to look up specific topics and directed one to corresponding passages in the Bible. According to Juror Nowakowski, some of the jurors were interested in looking up passages in the Bible concerning what God felt the government's position was when it came to judging people who murder other people. Ms. Nowakowski could not recall the exact passages that were read in the jury room during penalty phase deliberations, but did recall that the passages had to do with the right of judgment by the government in murder situations.

7. I spoke with juror Lana Eaton on September 25th, and October 16th, 1995. Juror Eaton confirmed that the Bible and a Bible Index were used by the jurors in the jury room during their penalty phase deliberations and that Bibles were in the jurors' hotel rooms. On Saturday July 1st, when the jurors resumed deliberations, Juror Eaton got the impression that several of the jurors had been researching the Bible the night before. Juror Eaton told me she remembered a Bible passage being brought up in which God says he will use man as his tool and if a man takes another man's life then the same needs to be done to

him. This passage helped her with her own personal feelings. Ms. Eaton also told me that she and her roommate looked at her roommate's Bible in their hotel room during the Friday evening break in sentencing deliberations and they both wrote down some verses. Ms. Eaton did not like the Bible that was in the hotel room so she asked to borrow her roommate's Bible. Juror Eaton researched the Bible and wrote down the passage about God using man to take the life of a murderer, plus some other passages that she does not now recall. After writing down the biblical passages, Juror Eaton left the hotel room for awhile and when she came back her roommate was reading the Bible and "basically doing the same thing" that Juror Eaton had done earlier with the Bible. According to Juror Eaton, she and her roommate smiled at each other and both knew they were thinking the same thing.

8. On October 1, 1995, I spoke with juror Lorri Salter. Ms. Salter confirmed that one juror, whom she believes was Jesus Cordova, brought a Bible Index with him to deliberations on Friday, June 30th. The next day of deliberations either two or three jurors brought Bibles with them to the jury room. Ms. Salter told me she remembers two specific passages from the Bible being used during penalty deliberations: one involved "an eye for an eye," and the other provided that, in Juror Salter's words, "if you kill somebody, that you're automatically, your life is given up because you've taken another" and "if you've taken one of God's creatures or, you know, man, that you're automatically – the sentence for that is death." Juror Salter told me that one juror stayed up most of the night on Friday June 30th, and went through the passages in the Bible and discovered that the passages that came up most often were those which required automatic

imposition of the death penalty when someone takes the life of another. She said there were no passages that talked about "life in prison," the passages that were reviewed by the jury spoke about death as the automatic penalty for murder.

9. On October 16, 1995, I contacted each of the four jurors who had spoken to me about the jurors' use of the Bible during sentencing deliberations. I requested that they sign an affidavit, which would set forth their observations about the jury's use of the Bible during deliberations. Each of the four jurors, Ms. Trujillo, Ms. Nowakowski, Ms. Salter and Ms. Eaton, stated that they did not want to sign any affidavit.

10. I do affirm and swear under oath that the foregoing statements are true and accurate to the best of my knowledge and belief.

FURTHER THE AFFIANT SAY NOUGHT.

Dated this 23rd day of October, 1995.

/s/ Raelee Knapp
RAELEE KNAPP

STATE OF COLORADO]
S.S.]
COUNTY OF DENVER]

Subscribed and sworn to before me this 23rd day of October, 1995.

My Commission Expires: 7-16-99

/s/ Adelaide Gonzales

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

NO. 05-87

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert Eliot Harlan, the Respondent, moves pursuant to Rule 39, for leave to proceed in forma pauperis and without payment of fees or costs in this matter, for the following reasons:

1. Mr. Harlan is today filing a Brief in Opposition in this Court.

2. Mr. Harlan has been represented by court appointed counsel, the Colorado State Public Defender, throughout his state appeals and throughout the proceedings in state district court. He has been declared indigent by all courts of the State of Colorado and has proceeded in forma pauperis since the time he was charged in 1994 with the offense that led to his conviction and incarceration.

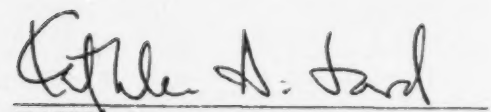
3. Mr. Harlan is incarcerated in the Colorado Department of Corrections and is without funds with which to pay the costs of this proceeding. An affidavit in support of Mr. Harlan's request for leave to proceed in forma pauperis is attached to this motion.

4. Mr. Harlan should not be deprived of his opportunity to respond to the State's petition for a writ of certiorari solely due to his indigency. Accordingly, he requests leave to proceed in forma pauperis.

WHEREFORE, the Respondent, Mr. Harlan, through undersigned counsel, respectfully requests this Court to grant him leave to proceed *in forma pauperis*.

Dated this 17th day of August, 2005.

DAVID S. KAPLAN
Colorado State Public Defender



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*Counsel of Record

NO. 05-87

SUPREME COURT OF THE UNITED STATES

October Term, 2005

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

DAVID S. KAPLAN
Colorado State Public Defender

KATHLEEN A. LORD*
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(303) 620-4888

*Counsel of Record

AFFIDAVIT OF ROBERT HARLAN IN SUPPORT

OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Robert Harlan, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in filing a Brief in Opposition to the Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of proceedings or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of filing a Petition for Writ of Certiorari and related proceedings are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1994, $1500 per mo.

---

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and other clothing? NO

a. If the answer is yes, describe the property and state the approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
NONE

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

8-17-05

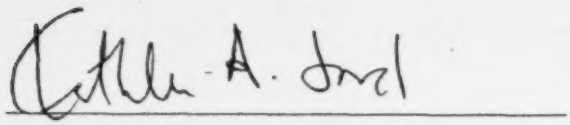
Subscribed and sworn to before me this ____ day of August, 2005, in the County of Fremont, State of Colorado.

My commission expires on _____

Questions read to Harlan by case manager Donna Murphy because Harlan has a blurred vision problem. Signed by Harlan in my presence
Donna Murphy
719 269-5282 TOTAL P.03

CERTIFICATE OF SERVICE

I, Kathleen A. Lord, hereby certify that a copy of the forgoing Motion to Proceed *in Forma Pauperis* and Affidavit in Support of Motion for Leave to Proceed *In Forma Pauperis* was deposited in the United States mail on August 17, 2005, and addressed to: Don Quick, District Attorney, 17th Judicial District, 1000 Judicial Center Drive, Suite 100, Brighton, Colorado 80601.



NO. 05-87

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner

v.

ROBERT ELIOT HARLAN,

Respondent.

BRIEF IN OPPOSITION

On Certiorari to the Colorado Supreme Court
Case No. 03SA173

DAVID S. KAPLAN
COLORADO STATE PUBLIC DEFENDER

KATHLEEN A. LORD*
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*Counsel of Record

INTRODUCTORY MATTERS

This brief in opposition is being filed pursuant to Supreme Court Rule 15. This Rule permits a respondent to initially waive a brief in opposition in all cases except those denominated a "capital case," pursuant to Rule 14.1(a). Although the People of the State of Colorado (hereinafter "the State") have identified this as a "capital case" on the first page of the petition for writ of certiorari, Respondent disputes this characterization.

Rule 14.1(a) provides that "[i]f the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented." Mr. Harlan was sentenced to death in 1995. However, on May 22, 2003, the state district court judge ordered that:

> The death sentence imposed against the Defendant Robert Eliot Harlan is hereby vacated and set aside. It is further ordered that the Defendant shall be returned to and appear before this Court as promptly as is possible so that he may be resentenced, pursuant to, and consistent with Colorado law. [Petition at A97]

The State appealed this Order to the Colorado Supreme Court. Because Colorado law does not clearly provide the State with the right to appeal a district court order vacating a death sentence, the supreme court treated the State's appeal as if it were an original proceeding. [*See* Petition at A14-A15]. The state supreme court, in affirming the lower court's ruling, writes:

> [W]e uphold the trial court's judgment vacating the death sentence and imposing upon Harlan a life sentence without the possibility of parole, and we discharge the rule. [Petition at A42]

Although the Colorado Supreme Court ultimately recalled and stayed the issuance of its mandate pending this Court's ruling on certiorari, Mr. Harlan's death sentence was vacated with the district court's order in May of 2003. Moreover, as explained in the Argument section below, the state courts in *People v. Harlan* have decided the issues presented purely as a matter

of state law. Accordingly, the respondent Robert Harlan is not under a death sentence that may by affected by this Court's disposition of the petition.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

I. The State Court Rulings Did Not Reach Any Federal Question

Attached to the Petition are the rulings of the state court district court judge and the state supreme court. The courts' opinions speak for themselves and establish that both courts decided this case based on: (1) the unique facts as found by the district court after extensive analysis and credibility determinations; and (2) Colorado state law.

The State's version of the facts was rejected by the district court judge who made extensive findings of fact and credibility determinations, (Petition at A61-A90), to conclude that:

A) **Several jurors read, researched and reviewed bibles and took notes from bibles in their hotel rooms during the Friday evening recess.** (A79)

> **Several jurors researched and reviewed bibles on Friday evening, June 30, 1995, to locate biblical passages pertaining to the penalty for murder. Some of the jurors wrote down the biblical passages they located so that they could take them to the jury deliberation room to share with other jurors on Saturday morning, July 1, 1995, when the jury reconvened to continue their deliberations.** (A82)

B) **Some jurors took a bible, bible index or notes with biblical passages into the jury deliberation room.** (A82)

> **Jurors took bibles and notes with biblical passages concerning the penalty for murder into the jury deliberation room on Saturday morning, July 1, 1995. These materials were read and discussed among and between jurors prior to a verdict being reached.** (A86)

C) **The evidence did not show that juror use of the bible, bible index or notes with biblical passages occurred only when jurors were in the fourth step of their deliberations** [i.e., after determining the defendant's eligibility for a death sentence]. (A87)

> **Jurors were exposed to bibles and bible passages concerning God's view on punishment for murder while they were sequestered during their deliberations on**

> **the penalty phase of the Defendant's trial. This occurred when they took the evening recess on Friday, June 30, 1995 and when they resumed their deliberation on Saturday, July 1, 1995. The biblical passages were read and discussed in the jury room. This occurred prior to the jury reaching a unanimous verdict. The credible evidence does not indicate that jurors were at a particular step in the four step process. What is certain is that a verdict imposing the death sentence had not been reached at the time the extraneous materials were considered.** [A89-A90]

(bold text in district court's original ruling).

The state district court applied Colorado law to its factual findings and ruled the death verdict must be reversed, because there was a "reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations." [Petition at A90, quoting *Wiser v. People,* 732 P.2d 1139, 1143 (Colo. 1985)]. The state district court also ruled that the Colorado death penalty statute required reversal, since it provides that "[a] sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor...." Section 16-11-103 (6) (b), 8A C.R.S. (1994 Cum.Supp.).

On appeal, the Colorado Supreme Court held that the district court's factual findings were supported by the record and that, under Colorado law, particularly *Wiser* and CRE 606(b), the death sentence must be vacated. (Petition at A5, A13, A29, A39). Moreover, the supreme court exercised its "independent responsibility," pursuant to §16-11-103(6) (b) and concluded that it could no longer say "that the death penalty verdict was not influenced by passion, prejudice, or some other arbitrary factor." (Petition at A13, citing *People v. Harlan,* 8 P.3d 448, 499-501 (Colo. 2002) (on direct appeal, the state supreme court had conducted its statutorily required independent review pursuant to §16-11-103(6)(b) and had affirmed the death penalty,

even though it was "troubled by several racial dimensions of this case and [concern] that racial bias may have been a factor in the imposition of the death sentence." *Id.* at 499.).

II. Certiorari Should Not Be Granted.

The Colorado Supreme Court relied exclusively on its interpretation of state law when it decided *In re People v. Harlan*, 109 P.3d 616 (Colo. 2005). [A copy of *Harlan* is attached to the petition as A1-A53]. Thus, this case presents no federal issue and the State has no basis for invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). Moreover, the two issues raised in the State's petition were not raised or addressed in the state courts below.

In its Question No.1, the State asserts that the Colorado Supreme Court "improperly undermine[-d] the jury's constitutional responsibilities under the Sixth Amendment and Eighth Amendments...." [Petition at i.] The State lacks standing to assert the alleged constitutional violations— the cited amendments create rights for the accused, not the government. Moreover, the Colorado Supreme Court did not rely on these constitutional provisions in reaching its decision.

In addition, the State mischaracterizes the state supreme court's ruling when it represents in Question No.1 that the state supreme court ruled "that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision without finding that jurors rested their moral decisions on biblical code rather than Colorado law." [*Id.*] This is not a case involving "the mere presence of a Bible" during deliberations. Rather, as noted above, the district court made extensive findings as to the jurors' actual use of mandatory death penalty passages from the Bible during deliberations.

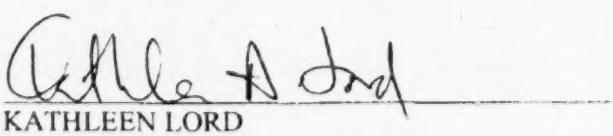
In its formulation of Question No.2, the State mischaracterizes the state supreme court's decision and presents a question of law that is not fairly raised by the *Harlan* decision. The State erroneously suggests that the Colorado Supreme Court adopted a standard of review that "improperly creates a new constitutional structural error because it would foreclose or prevent harmless error review in every case where [the presence of a Bible during the last stage of the death penalty jury deliberations] occurred." [Petition at i.]. In fact, the Colorado Supreme Court conducted a thorough analysis of the record for prejudice as required by state law. [Petition at A31-A39]. Under state law, the *Wiser* "objective test" applies for ascertaining prejudice. (*See Harlan,* A19, *citing People v. Wadle,* 97 P.3d 932 (Colo. 2004); *Wiser, supra*). Here, the Colorado Supreme Court carefully examined the nature of the Bible material introduced into the jury room and concluded, again as a matter of state law, that the jurors' exposure to extraneous material was prejudicial, i.e., that there was "a reasonable possibility that the extraneous biblical texts influenced the verdict to Harlan's detriment." *See Harlan,* A31-A39.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

DAVID S. KAPLAN

Colorado State Public Defender



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CERTIFICATE OF SERVICE

I, Kathleen A. Lord, hereby certify that a copy of the foregoing Brief in Opposition was served by depositing the same in the U.S. mail, prepaid, on August 17, 2005, and addressed to: Don Quick, District Attorney, 17th Judicial District of Colorado, 1000 Judicial Center Drive, Suite 100, Brighton, Colorado 80601.

Kathleen A. Lord 8/17/05